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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 89

AARON E. HENRY,

Petitioner,

v.

BENFORD C. COLLINS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi, entered on December 16, 1963, in the above-entitled cause.

Opinion Below

The opinion of the Supreme Court of Mississippi is reported at 158 So. 2d 28, and is appended hereto as Appendix A, *infra*, at page 1a.

Jurisdiction

A judgment affirming the trial court by the Supreme Court of Mississippi was entered on December 2, 1963. A Suggestion of Error on behalf of petitioner was overruled on January 20, 1964. Jurisdiction to review the judgment of the Supreme Court of Mississippi is granted to this Court under the provisions of Title 28, United States Code, § 1257 (3).

Questions Presented

1. Do the constitutional guarantees of freedom of speech, freedom of the press and freedom of association suffer the State of Mississippi to implement a rule of law whereby criticism of the official conduct of a public official is libelous per se and to impose damages of a punitive nature?

2. Do the guarantees of equal protection of the laws, and due process of law and the right to a fair and impartial trial implicit in the Fourteenth Amendment countenance (i) exclusion of Negroes from the jury panel which returned a verdict of money damages against the Negro petitioner; (ii) the reading to the jury of dictionary definitions of the allegedly libelous words; (iii) racially inflammatory remarks by respondent's counsel in the course of his summation and (iv) imposition of a money judgment in the precise amount demanded and in the absence of evidence of actual damage to respondent?

Statement

1. Prior Proceedings.

Petitioner was tried in the Circuit Court of Coahoma County on a complaint alleging libel per se and demanding damages of $15,000. After trial, an adverse verdict in the amount of $15,000 was returned by the jury which had retired for approximately 27 minutes (R. 176). On appeal to the Supreme Court of Mississippi, the judgment was affirmed on December 2, 1963, and a Suggestion of Error filed with supporting brief was overruled on January 20, 1964. On April 15, 1964, this Court granted a motion to extend from April 19, 1964, to and including May 15, 1964, the time for filing this petition.

2. Evidence Presented.

Petitioner is a pharmacist and a resident of Clarksdale (R. 37; 135), Coahoma County, Mississippi. He is president of the Coahoma County Branch and of the Mississippi State Conference of Branches of the National Association for the Advancement of Colored People (R. 93; 99; 106; 113); individually and as a part of his organizational affiliations, he is an active fighter for and advocate of civil rights for Negroes generally, and specifically in the State of Mississippi (R. 70; 127; 136-137).

On March 3, 1962, petitioner was arrested at his home by respondent, the Chief of Police of Clarksdale, for the misdemeanor of disorderly conduct, an offense allegedly having occurred in Bolivar County, which is adjacent to Coahoma County (R. 49; 91; 117; 121; 135). After he was taken to the local jail, petitioner's wife and a business associate were summoned and all were interrogated and their statements tape recorded by Thomas Pearson, County Attorney of Coahoma County and respondent in the companion case, *Henry* v. *Pearson*, Case No. ———, petition filed herewith (R. 65-66; 139). Although the offense occurred outside their jurisdictions, the only investigation was conducted by Pearson with the assistance of respondent (R. 120; 129; 140). Petitioner was later transferred to the custody of Bolivar County officials (R. 66; 121; 140). Subsequently, petitioner learned that he was charged with a morals offense which occurred in Bolivar County and involved an 18 year old white youth (R. 139-140). Although there was testimony that an affidavit was signed by the complaining witness on March 3, the date of petitioner's arrest, no such affidavit has ever been produced. Petitioner was tried and convicted for disturbing the peace upon an affidavit dated March 14, 1962, signed by the Bolivar County Attorney (R. 48; 55; 56-58; 141). Petitioner testified that he was aware of the lack of an original affidavit when he made his complaint to the Justice Department (R. 141). Disposition of the criminal charge by the courts of Mississippi is

the subject matter of *Henry v. State of Mississippi*, Case No. 539, petition for certiorari granted by this Court on February 17, 1964.

On March 5, 1962, based upon these events, petitioner made a formal complaint to the Department of Justice claiming an invasion of his civil rights and requested an investigation by the Federal Bureau of Investigation (R. 91; 144). Representatives of various news media called regarding that complaint (R. 141-142).

Following a conversation with an employee of United Press International, UPI and Associated Press released news stories which carried the AP or UPI byline, appeared on March 7, 1962, with several minor variations in the Clarksdale Press Register, and in newspapers in Vicksburg, Meridian, Corinth, Gulfport and Greenville (R. 86; 91, 103-104; 106-111; 142). Evidence of publication was limited to these Mississippi communities. The stories are appended hereto, *infra*, as Appendix B, at page 20a. Although these newspaper reports included additional statements attributed to petitioner concerning his complaint to the Justice Department, respondent relied only upon the following paragraph:

> Henry called the arrest 'a diabolical plot cooked up' by the Coahoma County prosecutor, Thomas H. Pearson and Collins . . .

On March 7, 1962, petitioner mailed a letter dated March 6, to the Chief of Police of Cleveland, Bolivar County, Mississippi; the letter was exhibited to two local officials, consequently, knowledge of the contents was limited until the trial of this cause (R. 37; 114). The letter is appended hereto, *infra*, as Appendix C, at page 28a.

Petitioner testified that he had intended to express a critical opinion of respondent's official participation in the arrest, and had so advised the news media (R. 142).

Both respondent and County Attorney Pearson denied that they had been involved in instituting petitioner's arrest (R. 66-68; 124).

Respondent testified that his initial knowledge of the offense came from police radio calls requesting identification of a motor vehicle license number and later advising that a warrant had been issued for petitioner's arrest (R. 115-117). Respondent arranged to have the warrant held at the police station until he could personally make the arrest (R. 117). The record amply reflects respondent's awareness that the offense occurred outside of his jurisdiction (R. 121; 128; 135).

On prior occasions, petitioner had been harassed and insulted by respondent and Pearson because of his civil rights activities and had been arrested by respondent at the direction of Pearson prior to the filing of an authorizing affidavit by Pearson (R. 71-72; 127).

Respondent testified that subsequent to publication of the newspaper stories, he received several telephone calls, but there was no evidence that anyone believed the content of the news releases (R. 125). The record is barren of evidence relating to the impairment of respondent's reputation or of any injury occasioned by the press releases or the letter. Conversely, the evidence is undisputed that the newspaper stories were understood as an expression of petitioner's opinion rather than actual fact and that respondent sustained no pecuniary or societal damage as a result of the stories (R. 125; 154-176). Moreover, continued confidence in respondent has been evidenced by the community, since between the time of the filing of the complaint and the trial, respondent was reappointed as Chief of Police after having been discharged for reasons unrelated to this case (R. 125).

3. Procedure Below: Preservation of Federal Questions.

On April 25, 1962, the complaint herein was filed charging petitioner with libel of respondent in his official capacity as Chief of Police, in a letter and in newspaper stories, and

demanding damages in the amount of $15,000 (R. 5-20). Petitioner denied the allegations of the complaint and a motion to amend his answer to aver the defense of qualified privilege by way of fair comment was denied at the trial (R. 21-22; 134-135). At the beginning of the trial, petitioner's motion to quash the jury panel for exclusion of Negroes was denied (R. 29-35). The court ruled that in the event of an adverse verdict, the motion to quash should be made part of a motion for new trial and a hearing accorded it at that time (R. 35-36). That hearing was held subsequent to the trial and the motion to quash was overruled (R. 179-214). Over petitioner's objection, dictionary definitions of the words "diabolical" and "plot" were read to the jury (R. 43-44), and in the course of respondent's summation, a motion for mistrial, based upon racially inflammatory comments of counsel, was overruled with an admonition to the jury to disregard the comments (R. 175-176).

At the termination of respondent's case, petitioner moved for a directed verdict on the grounds that the rendition of a verdict for respondent would be unsupported by evidence, and in violation of petitioner's right to freedom of speech, as well as a deprivation of property without due process of law. This motion was overruled (R. 134). The verdict returned by the jury was general and did not specify the type of damages awarded nor was any finding of malice made. Petitioner's motion for a new trial made at the conclusion of respondent's case was similarly overruled (R. 221). The latter motion stated that refusal to quash the jury panel was a denial of petitioner's rights under the Fourteenth Amendment, the verdict deprived petitioner of his right to freedom of speech guaranteed by the First Amendment and was contrary to the overwhelming weight of evidence; and excessive damages were a deprivation of due process required by the Fourteenth Amendment (R. 219).

An Assignment of Error was filed in the Supreme Court of Mississippi preserving all points raised below both by motion and by objection (R. 232-233). On December 2, 1962, the Supreme Court of Mississippi released its opinion affirming the judgment below. It found that the phrase "diabolical plot cooked up" charged respondent with a crime and was, therefore, libelous *per se* and that under the common law rule of libel *per se* applicable in that state, malice need not be established to sustain an award of punitive damages. Although the court stated that malice was actually established in this case, a reading of the opinion confirms that this finding was based upon the language attributed to petitioner and not upon any evidence relating to petitioner's state of mind. On December 30, 1963, petitioner filed a Suggestion of Error to the opinion of the court, in further exposition of the violation of petitioner's rights to due process of law, equal protection of the laws, a fair and impartial hearing, freedom from interference with First Amendment rights of speech and association, and constitutional insulation from state action, which, in effect, enforces segregation policies and practices. The Suggestion of Error was subsequently overruled (R. 269-284).

Reasons for Allowance of the Writ

1. The decision of the court below is in conflict with principles enunciated in *New York Times* v. *Sullivan*, — U. S. — (32 U. S. Law Week 4184) decided by this Court on March 9, 1964. Under the *ratio decedendi* of that case a court may not, consistent with First Amendment requirements, award or sanction damages for libel to public officials for criticism of their official conduct unless actual malice is in fact shown. Such an award is state action within the prohibition of the Fourteenth Amendment. *Bridges* v. *California*, 314 U. S. 252; *Shelley* v. *Kramer*, 334 U. S. 1;

Hurd v. *Hodge*, 334 U. S. 24; *Barrows* v. *Jackson*, 346 U. S. 249; *Wood* v. *Georgia*, 370 U. S. 375.

The court below determined that the statement attributed to petitioner fell within the common law definition of libel per se applicable in Mississippi, and that the privilege usually accorded criticism of public officials for their official conduct was insufficient to negate liability. It held that under Mississippi law, any language which is such as to "... produce hatred, contempt and ridicule, and to destroy credibility and degrade and lessen confidence and respect ... in the community ... *could only spring from wilfulness and malice or an utter disregard of all moral and ethical action of human conduct*" and is "therefore libelous per se." (Emphasis supplied) (App. 5a)

The finding of malice by the court below does not distinguish this case from *New York Times* v. *Sullivan*, *supra* since malice was inferred from the nature of the words used and not from any evidence reflected in the record. By a process of circuitous reasoning, the court found that petitioner was guilty of libel per se, because his statement tended to produce hatred, contempt and ridicule and to destroy credibility of and confidence in respondent, and because the statement tended to produce this result, actual malice existed (App. 7a). Application of this principle no more meets constitutional requirements than did reliance on the state statute and the presumption of damages by the Supreme Court of Alabama in *Sullivan*, since it merely restates, as the basis for the finding, the criteria of libel per se, and adheres to the consequent presumption of damages.

The court below, as did the Alabama court in *Sullivan*, regarded proof of truth as the only acceptable defense to respondent's allegations (App. 17a). Strict insistence that insulation from money damages can be effected only by proving the accuracy of a statement criticizing the public acts of public officials was condemned as insufficient

under constitutional standards in the *Sullivan* case. There, this Court stated:

> That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive," *NAACP* v. *Button*, 371 U. S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney* v. *Patterson*, 128 F. 2d 457, 458 (1942).

The Mississippi court held that only by establishing that respondent was a "perjurer and had suborned others to perjure themselves" could petitioner escape liability (App. 5a). By interposing its interpretation of petitioner's statement, the Supreme Court of Mississippi went further than that of Alabama which held that the only defense was to persuade a jury to the truth of all particulars stated.

Petitioner's motion to amend the pleadings to include the defense of privilege was denied by the trial court. The making of this motion insulates this case from the rule applied in *Beauharnais* v. *Illinois*, 343 U. S. 25, wherein this Court refused to consider a defense of "fair comment" or privilege since it had not been presented to the courts below. Denial of petitioner's motion was an abuse of discretion and violated his constitutional rights as declared by this Court in *Sullivan*. Just as the state may not, through application of a rule of law, circumscribe comment on public officials, it may not arbitrarily apply rules of practice and procedure to defeat constitutional rights. *Williams* v. *Georgia*, 349 U. S. 375; *Urie* v. *Thompson*, 337 U. S. 163; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 282; *Broad River Power Co.* v. *So. Carolina*, 281 U. S. 537; *New York Central* v. *N. Y. and Pa. Co.*, 271 U. S. 124; *Ward* v. *Love County*, 253 U. S. 17; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673; *Rogers* v. *Alabama*, 192 U. S. 226.

Normally, the right to amend pleadings at the trial, or at the end of the trial to conform to the evidence, is liberally allowed. This rule is applied when the defense of privilege is omitted from the pleadings; *Lee* v. *W. E. Fuetterer Battery & Supplies Co.*, 323 Mo. 1204, 23 S. W. 2d 45; *Broking* v. *Phoenix Newspapers*, 76 Ariz. 334, 264 P. 2d 413. Moreover, this rule is usually applied in Mississippi. *Bigner* v. *Hodges*, 82 Miss. 215, 33 So. 980. See also *Jarnigan* v. *Fleming*, 43 Miss. 710, cited with approval by the court below.

Because of its roots in the Bill of Rights, freedom of speech is more comprehensive than other rights embraced within the due process clause of the Fourteenth Amendment. In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, this Court observed:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.

The privilege accorded criticism of the government and public officials or comment on matters of public concern must extend the area of lawful comment well beyond that delineated for criticism of the private individual. Wide latitude is necessary in determining whether a given statement is within the constitutionally acceptable area since

free political discussion which will insure the reponsiveness of government to the will of the populace is essential to a free society and to social growth. See *De Jonge* v. *Oregon*, 299 U. S. 353; *Roth* v. *United States*, 354 U. S. 476, 484.

Although this Court has held that libel, like obscenity, is not within the scope of the First Amendment, that constitutional provision comprehends the right to exaggerate, to disseminate unpopular ideas, and must encompass the right to posture criticism of official conduct of a governmental official upon the perimeter of offensiveness or even within the ambit of the insulting. See, *Bridges* v. *California*, *supra*; *Terminiello* v. *Chicago*, 337 U. S. 1; *Pennekamp* v. *Florida*, 328 U. S. 331.

Petitioner questioned the circumstances surrounding his arrest and the court below held that by doing so, he had accused respondent of the commission of a crime and was, *a fortiori*, guilty of libel. Assuming that a challenge of the authority for official action is reasonably amenable to that construction, the basic issue is whether the First Amendment right to criticize official action is operable within an area limited by the nature of the action criticized.

Criticism of official conduct must concern professional acts, duties and obligations. A law enforcement agent is concerned with the application and enforcement of laws. Exception to the performance of his official acts must involve his professional conduct, hence it is inescapable that any expression of profound disapproval with his methods of operation will reflect on him professionally. Accordingly, the rule of law applied by the court below renders any attempt to take issue with official action vulnerable to a successful libel action and to liability for consequent money damages. If the First Amendment freedom to speak is to fulfill the purpose for which it was adopted, it must protect the right of the private citizen to

openly and vocally challenge the performance of official actions and to impute to public officials less than commendable motives.

In contempt proceedings precipitated by editorial or other comments, the scope of the constitutional right of free speech, freedom to express opinions of on judicial action or to criticize public officials is determined by weighing the right against the danger of the obstruction of justice. See *Bridges* v. *California, supra*; *Pennekamp* v. *Florida, supra*. A similar test which weighs the danger, that under the circumstances involved, a statement will produce hatred, ridicule and contempt must govern the permissible scope of criticism of the official acts of public officials if the right to dissent and to protest in the area of controversial matters of public concern is to be adequately protected by the First Amendment. And to whatever extent this thesis conflicts with the rationale of *Beauharnais* v. *Illinois, supra*, that case should be limited.

2. The foregoing presumes *arguendo* that the language quoted in the newspapers and attributed to petitioner is libelous in fact. Implicit in ascertaining the existence of libel is whether the ordinary person would be likely to understand the statement as an expression of the opinion of the speaker or writer or as a direct statement of existing fact. See Harper, *Torts*, note 14 at p. 543. Statements challenged as libelous must be judged in relation to the time, the surrounding circumstances and the understanding of the publisher, the public and the community where published. *Massee* v. *Williams*, 207 Fed. 222 (6th Cir. 1913); *Sweeney* v. *Schenectady Union Pub. Co.*, 122 F. 2d 288 (2nd Cir. 1941); *Spanel* v. *Pegler*, 160 F. 2d 619 (7th Cir. 1947); *Holden* v. *American News Co.*, 52 F. Supp. 24 (E.D. Wash. 1943), affd. 144 F. 2d 249 (9th Cir. 1944). *Tidmore* v. *Mills*, 32 So. 2d 769. Petitioner's civil rights advocacy is notorious in the white community in Mississippi, which is engaged in an active and growing battle over racial segregation

The record is devoid of evidence that any person or group understood the statement attributed to petitioner as an accusation damaging to respondent monetarily or otherwise. In the State of Mississippi, it is libelous per se to call a white person a Negro. *Natchez Times Pub. Co.* v. *Dunigan*, 221 Miss. 320, 70 So. 2d 681. Accordingly, it is unlikely that, under any circumstances, criticism of a public official by a known Negro civil rights activist, could fall within a definition of libel.

3. These actions were brought by public officials of a southern state conceived in segregation and dedicated to the principle that it shall be preserved.[1] See *United States* v. *City of Jackson*, 318 F. 2d 1, (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F. 2d 201 (5th Cir. 1963); and *Meredith* v. *Fair*, 298 F. 2d 696, (5th Cir. 1962), where this fact was judicially noticed by the court.

Significantly, although five newspapers printed petitioner's statement and two wire services disseminated similar stories, only petitioner was sued for libel. Previously respondent has used legal process to terminate expressions of protest against and satiation with Mississippi's racial practices on the part of petitioner and his asso-

[1] See Mississippi Constitution, § 225; Mississippi Code of 1942, Ann., § 7786 (segregation of races on streetcars and buses); §§ 4259, 7913, 7965, 7971 (segregation of races in prisons); §§ 6882, 6883 (separate mental wards); § 2351.5 (separate rest rooms in railroad and bus station waiting rooms for interstate passengers); § 2056(7) (punishes any conspiracy to violate the segregation laws of the state); § 3499 (unlawful for taxicabs to transport whites and Negroes together); § 7787.5 (requires construction of separate waiting rooms by all common carriers for intrastate passengers); § 2339 (misdemeanor to publish or advocate the social equality of the races); and § 4065.3 which requires all state officials to utilize their office to maintain segregation of the races.

ciates.[2] This Court is aware of the racial climate in the South and of the use of criminal and civil process to maintain a segregated society. As was stated in *NAACP* v. *Alabama*, 357 U. S. 449, at p. 460:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and *state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.*

and at p. 461:

> The governmental action challenged may appear to be totally unrelated to protected liberties. (Emphasis supplied)

Time and the evolution of the law have taught that the more primitive methods of stifling the voices of dis-

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[2] In January, 1962, petitioner was charged with violation of a "restraint of trade" statute for participating in a "protest" selective buying campaign. *State* v. *Henry*, No. 5243, now pending in the County Court of Coahoma County. Subsequent to the morals charge and these ensuing libel actions, petitioner's wife was discharged from the county school system. The Superintendent testified that her discharge was due to the morals charge, the libel actions and that he had "heard" that an action for fraudulent conveyance of property would soon be brought against her. *Noelle Henry* v. *Coahoma County Board of Education*, — F. Supp. — (8 Race Rel. Rep. 1480, decided December 23, 1963). What the Superintendent heard was prophetic and on May 15, 1962, Thomas Pearson filed a complaint for fraudulent conveyance against petitioner's wife. *Pearson* v. *Henry*, No. 13206, Chancery Court of Coahoma County, Mississippi. See also pages 19-21 of the petition for writ of certiorari filed in *Henry* v. *Mississippi*, Case No. 539. It is significant that these events and petitioner's arrests by Police Chief Collins on the charge of "parading without a permit," for picketing in peaceful demonstrations are termed "several other clashes with the law" by the court below (App. 4a).

sent and discontent with racial segregation have adverse national and international repercussions and are rarely tolerated by the appellate courts. As a result, more sophisticated means are utilized. There is little risk in resort to legal process and to jury trials in the rural south when whites are pitted against Negroes. Litigation, then, offers a reasonable means to achieve the desired result.

The Fourteenth Amendment prohibits "state action" and it is well settled that a state acts through its instrumentalities; its executive, judicial and legislative branches. *Shelley* v. *Kramer, supra; Monroe* v. *Pape,* 365 U. S. 167. It acts no less through its agents and employees. *Peterson* v. *City of Greenville,* 373 U. S. 244; *Lombard* v. *Louisiana,* 373 U. S. 267. It must follow that actions which offend this constitutional prohibition binding on the state can be no less proscribed when disguised as libel suits. Constitutional rights may not be nullified by evasive schemes whether attempted "ingeniously or ingenuously." See *Cooper* v. *Aaron,* 358 U. S. 1; *Gomillion* v. *Lightfoot,* 364 U. S. 339; *Smith* v. *Allwright,* 321 U. S. 649.

4. The decision below, by affirming the trial court's denial of petitioner's motion to quash the jury panel because Negroes were excluded therefrom, is in direct conflict with the rationale of a long line of this Court's decisions commencing with *Strauder* v. *West Virginia,* 100 U. S. 303. Since that case it has been settled that any action of the state, through any of its branches, whereby Negroes, because of their race, are systematically excluded from juries sitting in judgment on a member of their race, denies to the defendant equal protection of the laws guaranteed him by the Fourteenth Amendment. *Neal* v. *Delaware,* 103 U. S. 370; *Gibson* v. *Mississippi,* 162 U. S. 565. Not only exclusion, but continued absence from, or token presence on, jury panels of Negroes or defined minority groups is equally in conflict with constitutional commands. *Norris* v. *Ala-*

bama, 294 U. S. 587; *Smith* v. *Texas,* 311 U. S. 128; *Hernandez* v. *Texas,* 347 U. S. 475.

Examination of the series of decisions enunciating and following these principles is persuasive that their limitation to criminal trials merely reflects the circumstances in which the issue has been raised. *Strauder* v. *West Virginia, supra,* established that the right to an impartially selected jury was necessary to the protection of life, liberty and property. In *Virginia* v. *Rives,* 100 U. S. 313, this Court said on pages 322-323:

> It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color.

See also *Pierre* v. *Louisiana,* 306 U. S. 354. Accordingly, neither criminal judgments or indictments nor civil verdicts returned by a jury panel, unconstitutionally composed by reason of a racially discriminatory jury selection system, can stand against an appropriate challenge. See *Patton* v. *Mississippi,* 332 U. S. 463; *Avery* v. *Georgia,* 345 U. S. 559; *Anderson* v. *Alabama,* 366 U. S. 208; *United States ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71 (5th Cir. 1959).

The total population of Coahoma County is approximately 40,000, with Negroes exceeding whites (R. 34). The white population is 14,630 and the Negro population, 31,144 (R. 199). The county school system employs 161 Negro teachers and 31 white teachers, further evidence of the predominance of Negro residents in the county (R. 196).

Section 1762 of the Mississippi Code of 1942, Ann., requires that only "qualified electors" are competent jurors; accordingly, non-registered individuals cannot serve on juries. The determination of whether a person is "qualified" as a prospective juror is determined on a highly personalized basis by the County Board of Supervisors

(R. 180; 191; 194; 195). White persons selected for jury duty have always overwhelmingly outnumbered the few Negroes who have appeared (R. 185-186; 192; 195; 200; 202; 206; 208-210; 212; 214). Actual service of Negro jurors or their selection for jury panels has been too rare to be recalled (R. 182; 192-193). Four is the maximum number of Negroes ever to have appeared at one term of court and only one witness testified to the appearance of that many (R. 33; 186; 195; 208; 212; 214).

The paucity of Negro voters in Coahoma County does not reflect a voluntary mass decision of Negroes to forego enfranchisement. In terms of numbers alone, the record establishes discriminatory selection of Negroes for jury panels. The statistics in *1961—United States Commission on Civil Rights Report—Voting,* indicate that the appearance of Negroes should be at least two for every nine white jurors.

The evidence substantiates that Negroes constitute the overwhelming segment of the Coahoma County population, that many are *prima facie* qualified to become "qualified electors" and that the number actually selected over an extended period of time is so few as to establish a *prima facie* case of their exclusion from jury service. See *Smith* v. *Texas, supra.* Respondent was, therefore, required to go forward with refuting proof. See *Patton* v. *Mississippi, supra.* He chose not to do so, but elicited from the testifying supervisors, on cross-examination, denials of discriminatory conduct (R. 183; 186). Such bare denials are insufficient. *Hernandez* v. *Texas, supra.* Arbitrary barring of Negroes from the jury panel violates petitioner's right to due process and to equal protection of the laws and entitles him to a new trial. See *Norris* v. *Alabama, supra; Akins v. Texas,* 325 U. S. 398; *Reece* v. *Georgia,* 350 U. S. 85.

There is a new national awareness of the difficulties and obstacles encountered by Negroes attempting to register to vote in Mississippi. Racial discrimination in this

area is a matter of common knowledge and is well documented. Intimidation, an absence of official cooperation and discriminatory application of voting tests have resulted in effective disenfranchisement of otherwise qualified Negro voters. See *United States* v. *Wood*, 295 F. 2d 772 (5th Cir. 1961), cert. denied, 369 U. S. 850; *United States* v. *Lynd*, 301 F. 2d 818 (5th Cir. 1962). The requirement that a prospective juror be a registered voter coupled with the persistent discrimination against Negroes attempting to vote, effects their exclusion from or results in only token representation on, jury panels. This process of selection is vulnerable to the condemnation described in *Patton* v. *Mississippi*, *supra*, where this Court said on page 369:

> When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand.

Petitioner does not argue that any system which limits jurors to qualified voters is, by definition, unconstitutional, but in those communities where that procedure provides but another ingenious and indirect method for limiting the number of prospective Negro jurors or renders their qualifying nearly impossible, the same constitutional infirmity interdicted in *Patton* v. *Mississippi supra*, exists, These facts were recognized by the Fifth Circuit in *United States ex rel. Goldsby* v. *Harpole*, *supra*, where that court stated:

> We cannot assume that Negroes, the majority class in Carroll County, had en masse, or in any substantial number, voluntarily abstained from registering as electors and, by such action had rendered themselves ineligible for jury duty. If the registration offices freely and fairly registered qualified Negroes as electors, that fact rested more in the knowledge of the State.

There is in this case discrimination based upon the numerical facts and discrimination inherent in Mississippi's requirement that jurors be registered voters. "Tokenism" is not compliance with the law. See *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 499 (5th Cir. 1962); *Bailey* v. *Henslee*, 287 F. 2d 936 (8th Cir. 1961), cert. denied, 368 U. S. 877. The procedure for jury selection in Coahoma County does not meet standards imposed by the Fourteenth Amendment to the United States Constitution.

5. The cumulative errors in the trial below were so gross and so contrary to settled law as to effectuate a clear denial of due process and equal protection of laws mandated by the Fourteenth Amendment and to require review by this Court.

a. Ordinarily, injection into a case of dictionary definitions for the enlightenment of a jury may be unassailable. However the gravamen of libel is the meaning accorded the words in question by the average lay person to whom the libel is published. *Lorenz* v. *RKO Radio Pictures*, 155 F. 2d 84 (9th Cir. 1946); *Gang* v. *Hughes*, 218 F. 2d 432 (9th Cir. 1954); *Atlas Sewing Centers Inc.* v. *National Association*, 260 F. 2d 803 (10th Cir. 1958); *Curtis Publishing Company* v. *Vaughan*, 278 F. 2d 23 (D. D. C. 1959); *Venn* v. *Tennesscan Newspaper, Inc.*, 201 F. Supp. 47 (D. Tenn. 1962); *Martin* v. *Johnson Publishing Co.*, 157 N. Y. S. 2d 409; *Hirschhorn* v. *Group Health, Ins., Inc.*, 175 N. Y. S. 2d 775; *Coppola* v. *Dougherty*, 181 N. Y. S. 2d 425; *Fabian* v. *Amerikai Magyar SZO*, 198 N. Y. S. 2d 751; *Herriman* v. *Newark Morning Ledger Co.*, 138 A. 2d 61 (N. J.); *Richwine* v. *Pittsburgh Courier Publishing Co.*, 142 A. 2d 416 (Pa.); *Meier* v. *Meurer*, 98 N. W. 2d 411 (Wis.); *Purvis* v. *Bremer's Inc.*, 344 P. 2d 705 (Wash.); *Express Publishing Co.* v. *Gonzalez*, 326 S. W. 2d 544 (Tex.); *MacLeod* v. *Tribune Publishing Co.*, 343 P. 2d 36 (Cal.); *Gentry* v. *Wagoner County Publishing Company*, 351 P. 2d 718 (Okla.); *Chagnon* v. *Union Leader Corporation*, 174 A. 2d 825 (N. H.); *Brown* v. *National Home Insur-*

ance Co., 123 S. E. 2d 850 (S. C.); *Fawcett Publications, Inc.* v. *Morris*, 377 P. 2d 42 (Okla.); *Salvo* v. *Edens*, 116 So. 2d 220 (Miss.). This principle obtains in a determination of whether a publication is libelous *per se*. The meaning of the words is not to be determined by extreme or tortured definition; rather, words must be construed as they are commonly understood, *Walsh* v. *Miami Herald Pub. Co.*, 80 So. 2d 669.

Over petitioner's objection, the court allowed respondent to have dictionary definitions of the words "diabolical" and "plot" read aloud. Injected into the minds of the jury were such provocative words as "having to do with the devil," "witchcraft," "fiendish," "inhumanly wicked," and "plan," "contrive," "devise" and "evil sense". Any injury or exposure from an alleged libel must flow from the language in question; consequently, it is *that* language, as the jury finds the public to have understood it, which must form the basis for any adverse verdict. The court's determination permitted the jury to assess the community's understanding of words petitioner did not use and to assess damages against him for their impact. Such interference with the jury function, particularly in a libel action, destroys any possibility of a fair and impartial trial as mandated by the Fourteenth Amendment.

b. During his summation, the following comments were made to the jury by respondent's counsel:

> "Sullivan: 'If they put that white boy out on the highway, how in the world did they know that Aaron Henry was going to come by? I don't know. How in the world did they know a Pontiac was going to come down that highway being driven by Aaron Henry? Yet Aaron Henry himself said 'I picked him up on the highway.'
>
> (Loud murmur in courtroom.)
>
> Semmes Luckett: Your Honor, I will ask that the courtroom be cleared.

Court: Mr. Sheriff, I am not going to have that kind of thing going on in this courtroom. Is there a motion to clear the courtroom?

Charles Sullivan: No, sir, not as long as it doesn't reoccur.

Court: I want to announce that no person shall open their mouth again, regardless of who they are. This is the first time a thing like this has happened in the 23 years that I have been on the bench. Mr. Sheriff, stand out there and if a single person bats an eyelash I want them brought up here. Proceed with your argument, Mr. Sullivan.

Sullivan: 'Do you know what punitive damages are, and compensatory damages, for that matter? They are a by-product of our civilization. There was a period in man's history when if someone had said what Aaron Henry said about Ben Collins, there would have been a homicide that night—somebody would have gotten killed. There was a time in Mississippi when that would have happened. If Aaron Henry had accused this man of being a dirty crook, there was a time when there would have been a killing that night.

Jack H. Young: We object, your Honor.

Court: I sustain the objection.

Charles L. Sullivan: I think that is a proper statement, your Honor.

Jack H. Young: I would like to make a motion, your Honor, for a mistrial.

Court: I overrule the motion for a mistrial, but let the record show that I am instructing the jury to disregard that statement. Continue with your argument'' (R. 175-176).

Consideration of the effect these comments had on petitioner's right to a fair and impartial trial, consistent with the guarantees of the due process clause of the Fourteenth Amendment, must begin with an appreciation and recognition of the circumtances in which that trial took place. Initially, petitioner had reported to federal authorities an invasion by Mississippi officials of his civil rights. This factor alone assumed significance during the course of the trial (R. 144-145). Petitioner's civil rights activi-

ties and organizational affiliations are well known in Mississippi and provided a constant undercurrent to the proceedings (R. 71-72; 124; 136-137; 145; 160; 167-168). Ample testimony was elicited concerning the morals charges and the fact that the youth involved was white (R. 17; 67; 93) and all of the newspaper articles admitted into evidence reported this fact (R. 103; 107-112). At this posture of the proceedings, all that was necessary to insure prejudice was the overt inflammatory injection into the case of a racial issue. In evaluating the injury caused by such inflammatory statements, cognizance must be taken of the local racial conditions, the general atmosphere of the trial, the regional location of the trial and whether Negroes are pitted against whites. See *Garner* v. State, 120 Miss. 744, 83 So. 83; *Moulton* v. *State,* 199 Ala. 411, 74 So. 454; *Tannehill* v. *State,* 159 Ala. 51, 48 So. 662; *State* v. *Bessa,* 115 La. 259, 38 So. 985; *State* v. *Jones,* 127 La. 694, 53 So. 957; *State* v. *Bedford,* 193 La. 104, 90 So. 347; *Hamilton* v. *State,* 259 P. 168; *Walker* v. *State,* 235 P. 2d 722; *Roland* v. *State,* 194 S. W. 1097; *Manning* v. *State,* 257 S. W. 2d 6. The implication of the statements, rather than the statements themselves is sufficient to warrant a finding of unconstitutional prejudice. *State* v. *Jones, supra; Derrick* v. *State,* 272 S. W. 458; *Blocker* v. *State,* 16 S. W. 2d 253. Neither a general instruction to a jury nor the sustaining of an objection to an inflammatory statement cures its prejudicial effect. A statement calculated to, or having a tendency to engender prejudice, is sufficient to deprive a defendant of a fair and impartial trial. See *Harris* v. *State,* 22 Ala. App. 121, 113 So. 318.

The court below interpreted the remarks of respondent's counsel as a reference to the historical practice of dueling to avenge one's honor. This, petitioner submits, is a strained rationalization. A duel is not a homicide. Moreover, it is doubtful that the history of Mississippi recounts duels as the means selected by white men to

avenge their honor when it has been impugned by a Negro. Rather the comments clearly imply that a Negro, with the temerity to speak adversely of a white man, was, in the past, likely to be murdered and that respondent's willingness to settle for a money judgment alone, justified an award.

The court below held that failure to object to the first of the two comments made by respondent's attorney constituted waiver, but it is the cumulative effect of the statements, in tandem, which are calculated and sufficient to arouse bias in the jury.

Individually, each of these errors might be insubstantial, but their cumulative effect was sufficient to negate the fair and impartial trial implicit in the due process and equal protection clauses of the Fourteenth Amendment. See *In re Murchison*, 349 U. S. 133. And affirmance of the judgment of the trial court was a denial of constitutional rights on the part of the Supreme Court of Mississippi. See *Gibson* v. *Mississippi*, 162 U. S. 565, 586. The exclusion of Negroes from the jury; the use of dictionary definitions in a trial concerning the import and impact of words where the definitions are not attributable to an individual against whom money damages are sought, the injection into a racially charged climate of racially inflammatory comments and the return of a verdict, after minutes of deliberation, in the exact amount demanded, without evidence of loss, damage or malice, collectively can only indicate such bias and prejudice to petitioner's rights as to make that trial a travesty.

6. The important issues here raised which demand resolution by this Court can not be minimized by labeling this case a private libel action. The court below has allowed the civil charge of libel to become a device for the suppression of criticism of the administrators of government.

The essential issue is the right of the oppressed individual to express dissatisfaction with and a lack of con-

fidence in public officials who have conducted their offices to the fundamental disadvantage of citizens who have voiced disapproval with accepted traditions.

The struggle of the Negro for recognition of his civil rights has reached a new peak of activity, bringing forth strong declarations and denunciations from both sides of the fray. Statements, claims, disclaimers and accusations have taken vehement form as passions are released and both government and those who would change governments collide in the arena of opinion. Foreclosure of the right to criticize or even condemn the government and its officials strikes at the very heart of a democratic society. Repeatedly, this Court has recognized the primacy of unfettered discussion and debate on the issues of government, *De Jonge* v. *Oregon, supra.*

Transmutation of libel into an instrument to restrain and render mute criticism of the government and its administrators, destroys those liberties which the First Amendment was designed to protect.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

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Appendix A

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,759

AARON E. HENRY,

vs.

BENFORD C. COLLINS.

LEE, Presiding Justice:

This is a libel action, instituted by Benford C. Collins against Aaron E. Henry in the Circuit Court of Coahoma County, to recover damages on account of the publication of a false and defamatory charge against the plaintiff. There was a verdict for the plaintiff in the sum of $15,000, and the defendant has appealed.

The declaration charged that the defendant, on the 6th day of March 1962 maliciously prepared, composed and published a libelous writing to Mr. Norwood, Deputy Sheriff of Bolivar County, which contained a malicious libel against the plaintiff. It was also charged that the defendant, in like manner, made such charges to the United Press International News Bureau and the Associated Press News Bureau with express intent for these agencies to publish, republish, communicate and circulate the statements among their subscribers throughout the State of Mississippi and the other states of the United States. Copies of the alleged false statements were attached to the declaration as exhibits. It was also alleged that these

statements attributed to the plaintiff a gross violation of the law and his duties, and caused injury to him in his personal, social, official, business and professional life, thereby exposing him to public hatred, contempt and ridicule, with great damage to his reputation and good standing in the community.

The answer of the defendant admitted that he wrote the letter in question but that it was not maliciously prepared; and denied that the letter was false, defamatory and libelous. He likewise denied that he maliciously prepared and caused to be published the alleged communications to the press organizations and their subscribers; and denied that the plaintiff was injured in any way by reason of the publication.

Manuel Nasser, a Deputy Sheriff of Bolivar County and Deputy Marshal of the Town of Shelby, and Charlie Reynolds, a police officer of Clarksdale, on March 3, 1962, upon returning to the city hall in Shelby, after their efforts to locate a witness in a lawsuit, were accosted by Sterling Lee Eilert, who appeared to be scared, shaking and pale. He complained about an incident which had occurred in a black Star Chief Pontiac automobile, with a tag number ending in 1769, as he was hitchhiking from Memphis, Tennessee. These officers, in an effort to identify the automobile, called the Clarksdale Police Department, and were advised that Aaron Henry was the owner of a 1961 Pontiac automobile bearing License Tag No. C 14-1769. Eilert thereupon made an affidavit before V. E. Rose, a Justice of the Peace, charging Henry with disorderly conduct. The Justice of the Peace issued a warrant for the arrest of Henry on that charge and delivered it to Reynolds for transmission to the authorities in Clarksdale. When the warrant was received at Clarksdale, the plaintiff, the Chief of Police, went to the defendant's home and advised him that he was under arrest on a charge of disorderly conduct and gave him a copy of the warrant. When Collins delivered his prisoner to the city jail, Mayor W. S. Kincade,

who was at the police station, talked to Eilert, and directed Collins to call the County Attorney, Pearson, to come to the city hall for the purpose of an interrogation. With great reluctance, because he was preparing to go to a social activity, the county attorney went to the city hall and talked to the parties in order to ascertain where the alleged crime had actually occurred. To that end, he took tape recordings of the statements of Eilert, Clifford Smith, Noelle Henry, wife of the appellant, and appellant himself. When he had concluded the interrogation, the county attorney was of the opinion that no criminal offense had been committed in Coahoma County. The appellant was then turned over to Bolivar County officials.

On March 6, two days after his release, appellant wrote the letter complained about to Deputy Sheriff Norwood. Because of its length, the same is not set out verbatim. However, it advised the officer that he had filed a complaint with the Department of Justice, charging a denial of civil rights because of his arrest. Henry stated that the arrest "was born in the minds of the county attorney and the chief of police due to his activity" in certain areas. The letter told the officer that "I am not charging nor am I of the opinion that you nor any other authority of Bolivar County is a party to this diabolical plot. I do think that the two men above-mentioned (the county attorney and the chief of po[illegible]e) have schemed with some person to make the charge in Bolivar County", etc.

The statements which the defendant made to United Press International and the Associated Press, on the same date as the letter, were prepared by the appellant and read over the telephone to the representatives of the two press agencies. In each instance, defendant referred to his arrest on the charge of making immoral advances toward a male person in a claim that this was an attempt to discredit him. He called the arrest "a diabolical plot cooked up" by

Coahoma County Attorney Pearson and Clarksdale Police Officer Ben Collins. The representatives of the press agencies, in each instance testified that the appellant expressed the desire to read the statement to them, that he did so, and that they were particularly careful to write down his exact language. These statements were forwarded to subscribers and were published in the Clarksdale Press Register, the Biloxi-Gulfport Daily Herald, the Daily Corinthian, the Delta Democrat Times, and the Vicksburg Evening Post.

The appellant, forty years of age and a pharmacist, admitted that he wrote the letter to Mr. Norwood. He knew that the press agencies gathered and carried news items over the country, as he had previously given items to them. He admitted that he used the two words "diabolical plot" in his letter. But, in an effort to explain his use of the words in the letter and statement, he said that they constituted his opinion of what the acts amounted to, and they were not uttered as a result of malice. He admitted that he had experienced several other clashes with the law. His witnesses said that they believed that the appellant would tell the truth, but they did not think the publications resulted in any harm to the appellee.

The evidence showed that neither Nasser nor Pearson had ever seen Eilert prior to the time that he approached them in Shelby, and, successively, in the city hall at Clarksdale. Collins knew nothing of the events in Shelby until the message was received over the radio that a warrant had been issued for appellant's arrest. The evidence showed positively that no one had framed the defendant or "cooked up" any plot, diabolical or otherwise, to have him arrested on a morals charge. There was no contact between Collins and Pearson until Mayor Kincade directed Collins to call Pearson and tell him to come to the city hall.

The appellant assigns a number of alleged errors as grounds for a reversal, and these will be taken up and disposed of in the order in which they may be listed.

On the question of whether or not the appellant was entitled to a peremptory instruction at the close of the case, a proper evaluation of the evidence is as follows:

Some of the meanings of the expression "cook up", from their common acceptation, are "to make up: devise or fabricate often factitiously as an expedient: prepare, concoct, improvise—usu. used with up • • • " and "to alter to convey an untrue impression: falsify, doctor, angle, manipulate." Webster's 3rd New International Dictionary, Unabridged.

"Diabolical", in like manner, may mean "Of or relating to the devil or devils: being under the influence of devils: resembling a devil: devilish, fiendish." Webster's 3rd New International Dictionary, Unabridged.

"Plot", in like manner, may mean "conspiracy, intrigue." Webster's 3rd New International Dictionary, Unabridged.

Thus, if human testimony is to be believed, there was no semblance of justification or excuse for the utterance and publication of these statements. It is evident that the purpose was to create a defense of the charge for which he was arrested and to do this by charging the appellee and the other officer with "cooking up a diabolical plot" against him, meaning thereby that these officers were perjurers and had suborned others to perjure themselves. In other words, by this libel, these officers were charged with the commission of a loathsome and reprehensible crime, a crime so revolting as to produce hatred, contempt and ridicule, and to destroy credibility and degrade and lessen confidence and respect for them in the community. Such statements could spring only from wilfulness and malice or an utter disregard of all moral and ethical actions of human conduct. These statements were therefore libelous per se.

In Conroy v. Breland, et al., 185 Miss. 787, 189 So. 814, the opinion said: "At common law any written or printed language which tends to injure one's reputation,

and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community is actionable per se. Hodges v. Cunningham, 160 Miss. 576, 581, 135 So. 215; Wrought Iron Range Company v. Boltz, 123 Miss. 550, 558, 86 So. 354; and no special damages are necessary to be alleged or shown in order to prevail against a demurrer, or a motion to exclude. 3 Rest., Torts, Sec. 569. The statement of the rule, as set forth in this paragraph, must not be confused with that more precisely applicable to slander or oral defamations, and must, of course, be taken in connection with the further rule, prevailing in this State, that the truth of the matter alleged to be defamatory, whether in slander or in libel, is a good defense. Neely v. Payne, 126 Miss. 854, 89 So. 669; 36 C. J., pp. 1231, 1232, and cases there cited."

The Hodges and Boltz cases, cited in the above quotation, as well as Hines v. Shumaker, 97 Miss. 669, 52 So. 705, fully document the above statement. In Hines v. Shumaker, supra, the Court said:

"Appellant sought by their pleadings and proof to qualify the language of the letter, by pleading and endeavoring to prove that the letter did not charge, and was not intended to charge, generally, dishonesty to the plaintiff. But the question for the court to determine is, not what language the appellants meant to use, but what did they mean by the language actually employed?" See also Great A. & P. Tea Company v. Majure, 176 Miss. 356, 167 So. 637; and Natchez Times Pub. Company v. Dunigan, 221 Miss. 320, 72 So. 2d 631, the latter also pointing out that, the article being libelous per se, malicious intent is not even necessary to sustain the action, citing Jarnigan v. Fleming, 43 Miss. 710; Rodgers v. Kline, 56 Miss. 808; Upton v. Times Pub. Company, 104 La. 141, 28 So. 970.

If actionable per se, general damages need not be pled or proved, but are presumed to result. Travis v. Hunt, 224 Miss. 193, 79 So. 2d 734; Natchez Times Pub. Company

v. Dunigan, supra; and the cases with which those opinions are documented.

But malice was actually established in this case. See Kroger Gro. & Bak. Company v. Harpole, 175 Miss. 227, 166 So. 335, where it was said: "Malice in fact relates to the state or condition of the mind of a person who speaks defamatory words. It includes an intention to injure, hatred, or ill will, but is not limited thereto, and appears if words of the character here under consideration were spoken wantonly and in disregard of a civil obligation, i.e., if they were spoken recklessly without knowing or caring whether they were true. This is in accord with practically all of the authorities." See also Reliance Mfg. Company v. Graham, 181 Miss. 549, 179 So. 341.

Under the evidence, there was clearly such publication in the newspapers and by letter as to fasten liability upon the appellant. See 53 C.J.S., Libel and Slander, Sec. 85, p. 137, where it says in part: "The author of the defamation is liable for any secondary publication which is the natural consequence of his act; and this rule applies both to libel and slander." See also 33 Am. Jur., Libel and Slander, Sec. 197, p. 185, of like effect; Newell, Libel and Slander, 4th Ed., p. 339. Manifestly, the case, on the merits, was properly submitted to the jury, and the requested peremptory instruction was properly refused.

On Objection to Dictionary Definition of Words

In the course of the appellant's cross-examination, he was asked to read a dictionary definition of "diabolic" and "plot". The objection was that the meaning in question was what the witness, not what someone else, understood it to be. The witness read from the book the definition of "diabolic" and confirmed also the meaning of "plot" therein, saying in each instance that those were definitions. He was asked if he wished to pick out others, but he declined to do so; nor did he offer his own accepted definition for those words.

This Court has recognized that, under the Anti-Dueling Statute, Sec. 1059, Code of 1942, Rec., the words there contemplated are "from their usual construction and common acceptation * * * considered as insults, and calculated to lead to a breach of the peace * * *". Huckabee v. Nash, 182 Miss. 754, 183 So. 500, and Salvo v. Edens, 237 Miss. 734, 116 So. 2d 220.

In cross-examination, a wide latitude is allowed. The examiner, in this instance, was trying to ascertain the appellant's understanding of the words. The appellant, however, advanced nothing to the contrary. There is no complaint that the court used a dictionary definition in the instructions to the jury. Of course that cannoot be done. Jarnigan v. Fleming, supra, so held.

It therefore follows that the objection to this examination was without merit.

THE MOTION TO QUASH THE JURY PANEL

The appellant, on this motion, placed on the stand three supervisors and the chancery clerk of the county in an effort to show discrimination, because of race, in selecting, drawing and empaneling jurors. But these witnesses, with one accord, testified that there had been no discrimination whatever in the selection, drawing and empaneling of jurors as regards the white and Negro races; that they selected "qualified persons of good intelligence, sound judgment, and fair character" in strict conformity with Sec. 1766, Code of 1942, Rec.; and that there were no marks to indicate in any way the color of the potential jurors. Besides, six Negroes, registered and qualified persons, used as witnesses by the appellant, testified that they had been called for jury service several times in past years, and that others of like color were on the jury panels at those times. One witness testified that he remembered that eight or ten Negroes were called on the panel at one term last year. The trial judge stated into the record that

he had been the presiding judge of that court since January 1943; that, to his knowledge, Negroes had not been systematically kept off of juries; and that the court had empaneled them on both grand and petit juries since he had been judge. He mentioned cases when Negroes actually sat on the panel in trials. He either drew the names of the jurors, or they were drawn by the statutory officers, when he did not perform this service, and that there was no instance of failing to select, or of excluding, Negroes because of their race. There had always been quite a number of such names in the boxes.

In other words, the evidence wholly failed to show any discrimination against Negroes in the selection and empaneling of jurors. And so, as it was said in Wilson v. State, 243 Miss. 859, 140 So. 2d 275, at page 867:

"Appellant, therefore, did not meet his burden. His witnesses proved that the converse of his motion was true." See also Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 692, and cases there cited. Cf. also Hernandez v. Texas, 347 U. S. 475, 74 S. Ct. 667, 98 L. Ed. 866; Kennard v. State, 242 Miss. 691, 128 So. 2d 572.

This Court in Cameron v. State, 233 Miss. 404, 102 So. 2d 355, observed that it was a matter of common knowledge that the supervisors, in most of the counties in the state, since the decision of the Supreme Court of the United States in the case of Patton v. Mississippi, 332 U. S. 463, 68 S. Ct. 184, 186, 92 L. Ed. 76, have been placing the names of qualified Negroes in the jury boxes. Cf. also Goldsby v. State, 240 Miss. 647, 123 So. 2d 429 (1960), cert. den., 365 U. S. 861, 81 S. Ct. 829, 5 L. Ed. 2d 824, where a change of venue was granted because of lack of names of Negroes in the jury boxes in the county where the crime was committed.

Manifestly the court correctly overruled the motion to quash the panel of jurors on account of the alleged discrimination against selection of Negroes for jury service.

OVERRULING MOTION FOR MISTRIAL ON ACCOUNT OF ARGUMENT TO JURY BY COUNSEL FOR APPELLEE

The appellant contends that the court committed reversible error in its refusal to grant him a mistrial because of alleged prejudicial argument by counsel for appellee in the closing address to the jury. The record discloses the statements and the actions thereon as follows:

> "Sullivan: 'If they put that white boy out on the highway, how in the world did they know that Aaron Henry was going to come by? I don't know. How in the world did they know a Pontiac was going to come down that highway being driven by Aaron Henry? Yet Aaron Henry himself said 'I picked him up on the highway.'
>
> "(Loud murmur in courtroom.)
>
> "Semmes Luckett: Your Honor, I will ask that the courtroom be cleared.
>
> "Court: Mr. Sheriff, I am not going to have that kind of thing going on in this courtroom. Is there a motion to clear the courtroom?
>
> "Charles Sullivan: No, sir, not as long as it doesn't reoccur.
>
> "Court: I want to announce that no person shall open their mouth again, regardless of who they are. This is the first time a thing like this has happened in the 23 years that I have been on the bench. Mr. Sheriff, stand out there and if a single person bats an eyelash I want them brought up here. Proceed with your argument, Mr. Sullivan.
>
> (The record does not show that any objection whatever was made by counsel for appellant to the language which had been used or to what had occurred at that time.)

"Sullivan: 'Do you know what punitive damages are, and compensatory damages, for that matter? They are a by-product of our civilization. There was a period in man's history when if someone had said what Aaron Henry said about Ben Collins, there would have been a homicide that night—somebody would have gotten killed. There was a time in Mississippi when that would have happened. If Aaron Henry had accused this man of being a dirty crook, there was a time when there would have been a killing that night.

"Jack H. Young: We object, your Honor.

"Court: I sustain the objection.

"Charles L. Sullivan: I think that is a proper statement, your Honor.

"Jack H. Young: I would like to make a motion, your Honor, for a mistrial.

"Court: I overrule the motion for a mistrial, but let the record show that I am instructing the jury to disregard that statement. Continue with your argument."

The speaker then resumed his argument, and, from the context, it is clear that he was undertaking to explain the differences between punitive, and compensatory, damages. He asserted that punitive damages are a by-product of our civilization, saying that "There was a period in man's history when if someone had said what Aaron Henry said about Ben Collins, there would have been a homicide that night—somebody would have gotten killed. There was a time in Mississippi when that would have happened. If Aaron Henry had accused this man of being a dirty crook, there was a time when there would have been a killing that night." This reference was evidently to the pioneer days of the country when a man, who felt that his honor

had been questioned, arrogated to himself the right to be his own avenger. Dueling was commonly practiced, not only in this state, but in other parts of this country. A noteworthy instance is the well-known duel between Burr and Hamilton. In an effort to suppress this evil, the Legislature of the state enacted the so-called Dueling Statute, Sec. 1059, Code of 1942, Rec., making "All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace * * * actionable." Huckabee v. Nash, 182 Miss. 754, 183 So. 500; Salvo v. Edens, 237 Miss. 734, 116 So. 2d 220; as heretofore stated.

Since the first statement of counsel was not objected to at all during the trial and was first raised in appellant's brief in this Court, the objection is without merit. In Robertshaw Trustees v. Columbus & G. Ry. Co., 185 Miss. 717, 188 So. 308, it was said: "In order to put the trial court in error, it must be shown not only that there was error but that the error or errors were committed by the court after a fair and definitely presented opportunity was given to avoid or correct them." See also Stevenson v. Robinson, 37 So. 2d 568 (Miss.); Lyle v. Johnson, 240 Miss. 154, 126 So. 2d 266.

The basis of the rule against argumentative appeals to racial prejudice, in its full extent, is stated in Hampton v. State, 88 Miss. 257, 40 So. 545, as follows: "Mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing. All must be tried on facts, and not on abuse. Only impartial trials can pass the Red Sea of this court without drowning. Trials are to vindicate innocence or ascertain guilt, and are not to be vehicles for denunciation." And in Harris v. State, 96 Miss. 379, 50 So. 626, it was said: "Every defendant at the bar of his country, white or black, must be accorded a fair trial according to the law of the land, and that law knows no color." In the first instance, the sale of liquor was charged.

Objection to the prejudicial argument went unrebuked by the court, and exceptions were properly taken. In the second instance, the defendant, a Negro, was being tried on the charge of assault, with intent to murder a white man. Counsel protested and objected five times about the prejudicial remarks, but the same were ignored by the trial judge.

Insofar as his contention on the second statement is concerned, the appellant relies on seven cases from this jurisdiction, namely, Hardaway v. State, 99 Misc. 223, 54 So. 833; Moseley v. State, 112 Miss. 854, 73 So. 791; Garner v. State, 120 Misc. 744, 83 So. 83; Walton v. State, 147 Miss. 17, 112 So. 601; Roby v. State, 147 Miss. 575, 113 So. 185; Harris v. State, 209 Miss. 141, 46 So. 2d 91; Reed v. State, 99 So. 2d 455 (Miss.).

A study of these cases shows that, in every instance, except one, the defendants were Negroes and the State witnesses were Whites. In the Garner case, supra, although the victim of the rape was a young Negro girl, the exhortation to the jury by the prosecuting attorney was that they should not turn loose a brute of the defendant's race on the community.

Besides, in each instance there was an express appeal to racial prejudice, and the veracity of the witnesses, both Negroes and Whites, was expressly pitted against each other. In each case there were objections to the pungent arguments and appeals to prejudice by the prosecuting attorneys. In every case the trial judges either overruled the objections or declined or failed to rule on them at all. They did not disapprove or condemn such arguments nor did they admonish or direct the juries to disregard the same. Thus the judges did not, in any way, seek to effect the erasure of such prejudicial matters from the minds of the jurors.

Manifestly the cases, which the appellant has cited, are not indicative of what the court should hold in the present case. In this case, when the objection was made, the trial judge promptly sustained it. When counsel then

moved for a mistrial, the court overruled it but directed that the record should show that "I am instructing the jury to disregard" the speaker's statement. In the absence of the exact words which the judge used for that purpose, it must be assumed that they fully covered the matter.

This Court has recognized that, when an objection is made to arguments and the same is sustained by the court, usually the ill effect of the statement, if any, is corrected. In the case of Herrin v. State, 201 Miss. 595, 29 So. 2d 452, a manslaughter case, the district attorney, in his closing remarks to the jury, said: "'Gentlemen of the jury you can acquit the defendant on this charge and let him go free, and if you do he may kill another person, and the next time it may not be a colored person,' to which the defendant 'duly objected, and which objection the court duly sustained.'" The court, in dealing with this objection, said that "we are of the opinion that while the remarks of the district attorney constituted an appeal to race prejudice, and should not have been made, the action of the trial court in promptly sustaining an objection thereto was sufficient to prevent his overruling of the motion for a mistrial from constituting a reversible error, under all the facts and circumstances of this case." See also Pitts v. State, 211 Miss. 268, 51 So. 2d 448, an appeal from a life sentence; Thomas v. State, 200 Miss. 220, 26 So. 2d 469, a manslaughter case; Moon v. State, 176 Miss. 72, 168 So. 476, a death sentence; Bufkin v. State, 134 Miss. 116, 98 So. 455; Cavanah v. The State, 56 Miss. 299.

In the Pitts case, supra, dealing with the five statements in the bill of exceptions as improper but not sufficient to cause a reversal, the Court said: "After each of the statements, the court sustained objections to it. The cumulative effect on a jury of the trial judge's sustaining a defendant's objection to argument and after admonishing the state's attorney to stay within the evidence usually has the effect of curing the improper conduct and prejudicing the state's rather than the defendant's case." In the

Thomas case, supra, in overruling the claim of prejudice from the alleged injection of the racial issue into the case, the Court said: "The record shows that when the irregularities occurred the court not only sustained the objections made to them, but in each case the court expressly admonished the jury to disregard the matter of which the complaints were made; and this direct admonition to the jury by the court was sufficient to cure the improper conduct."

All of the cases show that the evil inveighed against in prejudicial argument of this kind is the appeal to racial prejudice and the arrayal of White against Negro.

The statement here under review cannot be held either to intend, or to produce, that result. In the explanation of punitive damages, counsel was merely saying that people in this state and country do not settle alleged reflections on their honor as they did in the old days. On the contrary the law recognizes the existence of injuries on that account, and provides for retribution in a lawful way by the award of damages without resort to six-guns or violence. Such was the purpose of the Anti-Dueling Statute. Whether this fact of history is known to the great masses of the people or not, at least the change in the method of settling such affairs is now known because the original practice has been greatly mitigated. Jurors in the county where this trial occurred are required to be men "of good intelligence, sound judgment and fair character."

There would be no difference between saying "if the defendant had done this to the plaintiff" and in saying "if Aaron Henry had done this act to Ben Collins." There simply was no appeal to racial prejudice.

The trial judge, out of an abundance of caution, sustained the objection and instructed the jury to disregard the statement of counsel. If it could, by the wildest stretch of the imagination, be said that any harm had resulted, manifestly such harm must have been eradicated from the minds of the jurors.

There is this added fact in connection with this assignment: The appellant made no claim in his motion for a new trial that he should be awarded this relief because of error in the refusal to grant a mistrial based on prejudicial argument to the jury by counsel for appellee.

The trial court had no opportunity whatever to review, following the completed trial, his action in that particular matter. This Court has repeatedly held that, unless the point is preserved in the motion for a new trial, the contention that the verdict is contrary to the great weight of the evidence cannot be reviewed here. Youngblood v. State, 216 Miss. 202, 62 So. 2d 218, and authorities there cited. Prejudicial evidence and prejudicial arguments are so closely akin that they should be treated in the same manner. There is no reason why the same rule should not be applicable to both. If one is to profit from the failure of the court to overrule a motion for a mistrial because of prejudicial argument, such point should be preserved by including it in the motion for a new trial. Inasmuch as it had not been heard of until its assignment in this Court, it must therefore be viewed as an afterthought. Consequently there was no error on the part of the court in this respect.

THE REFUSAL OF THE COURT TO PERMIT THE FILING OF A PLEA OF QUALIFIED PRIVILEGE

After the appellee had rested his case, the appellant asked leave to amend his answer and set forth the defense of qualified privilege, based on fair comment. This motion was denied on the ground that it had been filed too late. Be that as it may, however, the measurable privilege of publications, dealing with public officials, requires that such publications must be within the bounds of fair comment and must not be motivated by actual malice.

In the case of Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693, at p. 576 of the State Report, 76 So. 2d 699, this

Court cited and quoted from 33 Am. Jur., Libel and Slander, Sec. 169, pp. 161-164, as follows: "Although there are a few decisions to the contrary, the great weight of authority supports the view that publications dealing with political matters, public officers, and candidates for office are entitled to a measurable privilege by reason of the public interest involved therein. The principal limitations upon the rule are that the statements must be within the bounds of fair comment and must not be motivated by actual malice * * *. The rule does not, however, place such persons wholly without the protection of the law, and although there is authority to the contrary, it is generally held that accusations of crime, dishonesty, fraud, corruption, immorality, etc., and imputations of dereliction of duty, favoritism, or misconduct in office, are not privileged." See also Edmonds v. Delta Democrat Publishing Company, 230 Miss. 583, 93 So. 2d 171; Scott-Burr Stores Corporation v. Edgar, 181 Miss. 486, 177 So. 766; Kroger Grocery & Baking Company v. Harpole, supra; Louisiana Oil Corporation v. Tenno, 173 Miss. 609, 157 So. 705; Hodges v. Cunningham, 160 Miss. 577, 135 So. 215; Hines v. Shumaker, supra. Likewise, the Law of Torts, Harper and James, p. 457, is to the effect that proof of actual malice defeats the qualified immunity of fair comment.

The statements in this case accused the appellee of being guilty of crimes. There was no evidence to sustain such a charge. The appellant, who was called by the appellee as an adverse witness in the presentation of his case, had, in no way, offered any suggestion of a qualified privilege under the theory of fair comment. Consequently, such a defense would have been without avail. The appellant therefore could have suffered no injury whatever from the denial of his motion in this particular.

THE RESTRICTION OF LIBEL INFRINGES THE FREEDOM OF SPEECH

This contention is utterly untenable. The authorities are legion as to the right to call a person, guilty of malicious libel, into account for his defamation. The Supreme Court of the United States in Konigsberg v. State Bar of California, 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105, said that the First Amendment is not an absolute. See also Near v. Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357.

THE AMOUNT OF THE VERDICT

The appellant contends that the verdict in this case is grossly excessive and evinces passion and prejudice. Under the law, damage is presumed to result from a malicious libel and, of course, it followed from the publication of this malicious libel. Reckless negligence in the infliction of a personal injury would afford a remedy to the victim. As was said in Jarnigan v. Fleming, supra, "Character is far more sacred than property, and should be protected by courts and juries with watchful care. Persons who injure the character of others, ought to be no less answerable to justice than those who injure property."

When the words are prompted by malice, punitive or exemplary damages may be awarded. Kroger Gro. & Bk. Company v. Harpole, supra; Interstate Company v. Garnett, 154 Misc. 325, 122 So. 373; Gardner v. Martin, 123 Misc. 218, 85 So. 182; 53 C. J. S., Libel and Slander, Sec. 260 b., p. 373. In the Garnett case, supra, this Court let $15,000 of a verdict of $25,000 stand, although in that case it was necessary for the jury to determine, because of the susceptibility of two potential meanings of the words, whether or not the particular words were slanderous. Too, that case was decided in 1929 when dollars had greater purchasing value. In that case, there was proof as to the financial worth of the appellant, whereas there

is no evidence on that phase of the case in the present record. But this Court cannot be blamed for lack of that information.

When published statements are considered and reduced to writing, there is study and concentration on the subject matter. This clearly establishes deliberate intent, evincing malice if the same is false. On the contrary, a sudden loss of temper may be the reason for the utterance of a defamatory statement. For that reason, it may be that a jury would be impelled to award a larger verdict for injuries flowing from libel than from slander.

According to the evidence, the appellee was thirty-two years of age, married and the father of one child. He was a dedicated officer, having been engaged in the important occupation of law enforcement since 1956. He was striving to make a successful life career in that phase of human endeavor. His salary at the time was $600 per month. He had noted ill effects and symbols as a result of the defamation, and these were not restricted to the local area.

The Court is unaware of any rule whereby it can justly reduce the amount of this verdict which was solemnly adjudged by the jury. That being true, the Court is not in position to say that the verdict is grossly excessive or that it evinces passion or prejudice on the part of the jury.

The Court finds no reversible error in the case and the judgment of the trial court must therefore be affirmed.

AFFIRMED.

KYLE, MCELROY, RODGERS and JONES, *JJ.*, concur.

Appendix B

COPY OF ARTICLE WHICH APPEARED IN THE CLARKSDALE PRESS REGISTER, WEDNESDAY AFTERNOON, MARCH 7, 1962, AT PAGE 12:

FBI Investigation Asked
NAACP PRESIDENT RAPS 'PLOT' BY OFFICERS

Aaron Henry, state president of the National Association for the Advancement of Colored People, said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Clarksdale Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

Henry called the arrest "a diabolical plot cooked up" by the Coahoma County prosecutor, Thomas H. Pearson, and Collins.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Mississippi.

He said it was "legally inconceivable that he could be charged with any crime taking place outside the city limits of Clarksdale" last Saturday and that he had "unimpeachable witnesses to prove his whereabouts at all times."

Henry's complaint questioned his arrest by city officers, and he said that Coahoma Sheriff L. A. Ross "could never have been persuaded to go along with such a plot."

COPY OF ARTICLE WHICH APPEARED IN THE GULFPORT DAILY HERALD ON MARCH 7, 1962, AT PAGE 15:

CLAIMS CIVIL RIGHTS VIOLATED

Clarksdale, Miss. (AP) Aaron Henry, state president of the National Association for the Advancement of Colored People, says he has complained to the Justice Department that his civil rights were violated when officers arrested him here.

Henry was arrested Saturday night on charges of disturbing the peace. Bolivar County Atty. Frank Wynne said the charges stemmed from "obscene advances on a male person."

Henry, 39-year-old Negro, said Tuesday night he filed his complaint with the Justice Department.

He said the arrest was an attempt to discredit him, the NAACP and the "Negro freedom movement in Clarksdale and Coahoma County."

Henry charged the arrest was "a diabolical plot cooked up" by Coahoma County Atty. T. H. Pearson and Clarksdale police chief Ben Collins.

An 18-year-old white hitchhiker from Memphis claimed that Henry gave him a ride and made unnatural advances in the car.

COPY OF ARTICLE WHICH APPEARED IN THE MERIDIAN STAR ON MARCH 7, 1962, AT PAGE 2:

NAACP PRESIDENT
ARRESTED IN DELTA
ON MORALS CHARGE

Clarksdale, Miss. (UPI)—Aaron Henry, state president of the National Association for the Advancement of Colored People, said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Miss.

COPY OF ARTICLE WHICH APPEARED IN THE DAILY CORINTHIAN ON MARCH 7, 1962, AT PAGE 4:

NAACP LEADER ASKS FBI PROBE OF HIS ARREST

Clarksdale, Miss. (UPI)—Aaron Henry, state president of the National Association for the Advancement of Colored People, said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

Henry called the arrest "a diabolical plot cooked up" by the Coahoma County prosecutor, Thomas H. Pearson, and Collins.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Miss.

He said it was "legally inconceivable that he could be charged with any crime taking place outside the city limits of Clarksdale" last Saturday and that he had "unimpeachable witnesses to prove his whereabout at all times."

Henry's complaint questioned his arrest by city officers rather than county sheriff's officers, and he said that Coahoma Sheriff L. A. Ross "could never have been persuaded to go along with such a plot."

COPY OF ARTICLE WHICH APPEARED IN THE DELTA DEMOCRAT-TIMES ON MARCH 7, 1962, AT PAGE 2:

NAACP BOSS ASKS FBI TO PROBE ARREST

Clarksdale, Miss. (UPI)—Aaron Henry, state president of the National Association for the Advancement of Colored People said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

• • • •

Henry called the arrest "a diabolical plot cooked up" by the Coahoma County prosecutor, Thomas H. Pearson, and Collins.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Miss.

He said that it was "legally inconceivable that he could be charged with any crime taking place outside of the city limits of Clarksdale" last Saturday and that he had "unimpeachable witnesses to prove his whereabouts at all times."

Henry's complaint questioned his arrest by city officers rather than county sheriff's officers, and he said that Coahoma Sheriff L. A. Ross "could never have been persuaded to go along with such a plot."

COPY OF ARTICLE WHICH APPEARED IN THE VICKSBURG EVENING POST ON MARCH 7, 1962, AT PAGE 3:

COMPLAINT FILED

Clarksdale, Miss. (AP)—Aaron Henry, state president of the National Association for the Advancement of Colored People, says he has complained to the Justice Department that his civil rights were violated when officers arrested him here.

Henry was arrested Saturday night on charges of disturbing the peace. Bolivar County Atty. Frank Wynne said the charges stemmed from "obscene advances on a male person."

Henry, 39-year-old Negro, said Tuesday night he filed his complaint with the Justice Department.

He said the arrest was an attempt to discredit him, the NAACP and the "Negro freedom movement in Clarksdale and Coahoma County."

Henry charged the arrest was "a diabolical plot cooked up" by Coahoma County Atty. T. H. Pearson and Clarksdale police chief Ben Collins.

An 18-year-old white hitchhiker from Memphis claimed that Henry gave him a ride and made unnatural advances in the car.

UNITED PRESS INTERNATIONAL

Aaron Henry, state president of the National Association for the Advancement of Colored People, said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Clarksdale Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

Henry called the arrest "a diabolical plot cooked up" by the Coahoma County prosecutor, Thomas H. Pearson, and Collins.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Mississippi.

He said it was "legally inconceivable that he could be charged with any crime taking place outside the city limits of Clarksdale" last Saturday and that he had "unimpeachable witnesses to prove his whereabouts at all times."

Henry's complaint questioned his arrest by city officers, and he said that Coahoma Sheriff L. A. Ross "could never have been persuaded to go along with such a plot."

ASSOCIATED PRESS

Clarksdale, Miss., March 6—(AP)—Aaron Henry, 39-year-old State President of the National Association for the Advancement of Colored People, said Tuesday night he had filed a complaint with the Justice Department charging violation of his civil rights.

Henry claimed the violation came in his arrest on charges of disturbing the peace. Bolivar County Atty. Frank Wynne had said the charges grew out of "obscene advances on a male person."

The arrest, Henry said, was an attempt to discredit him, the NAACP and the "Negro freedom movement in Clarksdale and Coahoma County."

He charged the arrest was "a diabolical plot cooked up" by Coahoma County Atty. T. H. Pearson and Clarksdale Police Chief Ben Collins. Henry added that Sheriff L. A. Ross of Coahoma County must "have been bypassed in the plot. The sheriff does not agree with out movement but also won't sell himself to do such a thing."

"It is my opinion," Henry said, "Whatever the charge is—it has been concocted between certain city and county officials. It is not going to slow our work down."

He has led a campaign to get merchants to stop referring to Negroes as "nigger" and "boy" and to get Negroes jobs above menial labor.

Henry said officials weren't specific as to when the act occurred, but said they asked him where he was between 5 and 6 P.M. Saturday.

Henry said he had his car washed between 10 A.M. and 5:20 P.M. Saturday and never left Clarksdale. He was supposed to have picked up an 18-year-old white hitchhiker from Memphis in Mound Bayou and made unnatural advances.

Henry was arrested Saturday night in Clarksdale and later released on $1,000.00 bond. He said the bond he signed did not have the charge written down.

He also questioned the authority and validity of the charge because Coahoma County Atty. T. H. Pearson told him Bolivar County authorities reported the offense to city authorities rather than County.

"It's unusual," he said, "that the Bolivar County Sheriff came to the city hall here to report the charge instead of to the Coahoma County Sheriff."

Henry said his attorney, R. Jess Brown of Jackson, had not been advised when a trial would be held.

Appendix C

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Twenty West Fortieth Street
New York 18, N. Y.

LOngacre 3-6890

Please direct reply to:

Mr. Medgar W. Evers
1027 Lynch Street, Room 7
Jackson 3, Mississippi

FLeetwood 3-6906

March 6, 1962

Mr. Norwood
Deputy Sheriff
Bolivar County
Cleveland, Miss.

Dear Mr. Norwood:

First I want to thank you for the fair manner in which I was treated while in your coustdy as a prisoner on Saturday Night March 3rd, 1962. Except for our discussion concerning the hand cuffs and the body chain there was no other difficulties of which I am appreciative.

You will probably see in print where I have filed a complaint with the Justice Department charging a denial of Civil Rights in the arrest itself. The complaint states that in my opinion the charge under which I was arrested was born in the minds of the County Attorney and the Chief of Police of my town due to my activity in the area of Desegregation, Registering and Voting and politics as I serve on the committed of the Trammell to Congress Committee, sponsorning a Negro for Congress. Also these two men are against me due to my activity in suggesting

to Negroes that we all trade in those stores thay employ us and hire us above the menial level.

What I want to be clearly understood that I am not charging nor am I of the opinion that you nor any other authority of Bolivar County is a party to this diabolical plot. I do think that the two men above mentioned has schemed with some person to make the charge in Bolivar County and unknowingly Bolivar County is being used to some extent as a party in the Racial difficulties of Coahoma County. I believe that Coahoma County should contain its own racial strife and not schemingly get other counties involved in our own difficulties.

Incidentally when I recieved my personals from the jail at Cleveland my address books was missing. I would like to know if you can tell me what procedure I can or should use to get it back as there are some persons in the book I would like to keep in touch with.

Again I say a personal thanks to you.

A fellow Mississippi Citizen,

Aaron E. Henry

AARON E. HENRY, President, Miss. State Conference NAACP
213 4th Street
Clarksdale, Miss.

Aaron E. Henry, President
Miss. State NAACP
213 Fourth Street
Clarksdale, Miss.

(stamp)

Mr. Norwood
Chief Deputy Sheriff
Bolivar County
Cleveland, Miss.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 90

AARON E. HENRY,

Petitioner,

v.

THOMAS H. PEARSON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE

Supreme Court of the United States

October Term, 1963

No.

AARON E. HENRY,

Petitioner,

v.

THOMAS H. PEARSON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi, entered on December 16, 1963, in the above-entitled cause.

Opinion Below

The opinion of the Supreme Court of Mississippi is reported at 158 So. 2d 695 and is appended hereto as Appendix A, *infra,* at page 1a. The opinion in *Collins* v. *Henry,* 158 So. 2d 28, which supplements the opinion in this case is appended hereto as Appendix B, *infra,* at page 17a.

Jurisdiction

A judgment affirming the trial court by the Supreme Court of Mississippi was entered on December 16, 1963. A Suggestion of Error on behalf of petitioner was overruled on January 27, 1964. Jurisdiction to review the judgment of the Supreme Court of Mississippi is granted to this Court under the provisions of Title 28, United States Code, § 1257(3).

Questions Presented

1. May the State of Mississippi, consistent with the constitutional guarantee of freedom of speech, press and assembly, implement a rule of law whereby criticism of the official conduct of a public official is libelous per se and impose damages of a punitive nature?

2. Has the state afforded due process of law and a fair and impartial hearing by affirming a judgment for damages in the amount of $25,000, the precise amount demanded in the complaint, in the absence of any evidence of monetary or societal damage to respondent?

Statement

1. Prior Proceedings.

Petitioner was tried in the Circuit Court of Coahoma County on a complaint alleging libel per se and demanding damages of $25,000. After trial, an adverse verdict in the amount of $25,000 was returned by the jury which retired for approximately 33 minutes (R. 173; 174). On appeal to the Supreme Court of Mississippi, the judgment was affirmed on December 16, 1963 and a Suggestion of Error filed with supporting brief was overruled on January 27, 1964 (R. 210; 213). On April 15, 1964, this Court granted a motion to extend from April 26, 1964 to May 15, 1964, the time for filing this petition.

2. Evidence Presented.

Petitioner is a pharmacist and a resident of Clarksdale, Coahoma County, Mississippi (R. 38). He is president of the Coahoma County Branch and of the Mississippi State Conference of Branches of the National Association for the Advancement of Colored People (R. 25; 118D-118H; 132); individually and as a part of his organizational affiliations, he is an active fighter for and advocate of civil rights for

Negroes generally, and specifically in the State of Mississippi (R. 55-56; 132; 133-135; 149; 152; 170).

On March 3, 1962, petitioner was arrested at his home by Clarksdale Chief of Police, Benford Collins, respondent in the companion case, *Henry* v. *Collins,* Case No. ——, petition filed herewith, for the misdemeanor of disorderly conduct which allegedly occurred in Bolivar County, the county adjacent to that of petitioner's residence (R. 80; 85; 154).

Despite the fact that the alleged offense occurred out of his jurisdiction, respondent conducted the investigation in the local jail in Clarksdale to which petitioner had been brought by Chief of Police, Collins (R. 86; 140). There was much official interest in Coahoma County in petitioner's arrest. The arrest was made by Collins despite the availability of other officers in the vicinity of petitioner's residence (R. 82). Although only a misdemeanor was charged, the Mayor of Clarksdale proceeded to the local jail on a Saturday evening, an admittedly rare occurrence, and questioned the complaining witness (R. 93-94). Respondent was summoned by Collins who after preliminary interrogation, went to his office for a tape recorder and recorded statements from petitioner, his wife and a business associate (R. 125; 139-140). Petitioner remained in the custody of respondent and Collins for interrogation, after which he was transferred to Bolivar County officials and incarcerated overnight in a Bolivar County jail (R. 39; 64; 155). Subsequently, petitioner learned that he was charged with a morals offense occurring in Bolivar County and involving an 18-year old white youth (R. 38; 154). Disposition of the criminal charge by the courts of Mississippi is the subject matter of *Henry* v. *Mississippi,* Case No. 539, petition for certiorari granted by this Court on February 17, 1964.

On March 5, 1962, based upon these events, petitioner made a formal complaint to the Department of Justice

claiming an invasion of his civil rights and requested an investigation by the Federal Bureau of Investigation (R. 53).

Representatives of various news media called regarding the complaint (R. 44). Following conversations with either a United Press International or Associated Press employee, the wire services released news stories which appeared on March 7, 1962, with several minor variations, in the Clarksdale Press Register, and in newspapers in Vicksburg, Meridian, Gulfport, Corinth and Greenville, all communities in Mississippi (R. 44-45; 116½; 118B-118H). Evidence of publication is limited to these areas. These stories are appended hereto as Appendix C, *infra*, at page 36a. Although these newspaper reports contained additional statements attributed to petitioner concerning his complaint to the Justice Department, respondent relied only upon the following paragraph:

> Henry called the arrest 'a diabolical plot cooked up' by the Coahoma County prosecutor, Thomas H. Pearson and Collins . . .

On March 7, 1962, petitioner mailed a letter dated March 6th, to the Chief of Police of Cleveland, Bolivar County, Mississippi, who exhibited it to two officials (R. 119-120); consequently, knowledge of the contents was limited until the trial of this cause. The letter is appended hereto, *infra*, as Appendix D, at page 44a.

Although there was testimony that an affidavit was signed by the complaining witness on March 3, the date of petitioner's arrest, no such affidavit has ever been produced. Petitioner was tried and convicted for disturbing the peace upon an affidavit dated March 14, 1962, signed by the Bolivar County Attorney (R. 60; 156-157). Chief of Police Collins testified that while he was on traffic duty in Clarksdale, he heard a radio call for identification of an automobile and later that a warrant had issued for peti-

tioner's arrest (R. 69-70). He advised police headquarters to hold the warrant until he could personally arrest petitioner (R. 71; 82).

Respondent testified that as a private practitioner, Negroes comprise part of his clientele and that he intends to run again for the office of County Attorney (R. 128; 150). Although the newspaper story was discussed with some of respondent's clients and social friends there is no evidence that the story was believed to be true by anyone (R. 129; 130-131).

A former district attorney of Greenwood, Mississippi, testified that in his opinion a "charge that a county attorney . . . had 'concocted a diabolical plot to bring about the arrest of a citizen on a morals charge' would . . . impute a crime to the county attorney" and "lower him in the public's esteem and confidence" (R. 121-122). The record is barren of evidence that any segment of the general public believed that charges had been leveled against respondent or that the statement was factual; conversely, there is evidence that the story was disbelieved (R. 130). Not only has there been no decline in respondent's Negro clientele but recognition has been accorded him by his professional colleagues through his appointment to the Criminal Law Section of the Mississippi State Bar Association (R. 131; 172). There was undisputed testimony that in view of community hostility toward the NAACP, its officers and members and all civil rights workers in Mississippi, the newspaper stories, if believed, could only enhance respondent professionally and politically (R. 144; 168-169; 190).

On prior occasions, respondent has harassed and verbally abused petitioner because of his civil rights activities. At respondent's direction, Collins arrested petitioner prior to the filing of an authorizing complaint, for conspiracy to restrain trade. The charge was based upon petitioner's participation in a selective buying campaign protesting segregation practices by Clarksdale businessmen (R. 132-136; 153).

3. Procedure Below: Preservation of Federal Questions.

On April 25, 1962, the complaint herein was filed charging petitioner with libel of respondent in his official capacity as County Attorney, in a letter and in newspaper stories, and demanding damages in the amount of $25,000 (R. 4-18). Petitioner denied the allegations of the complaint and a motion to amend his answer to aver the defense of qualified privilege by way of fair comment was denied at the trial (R. 19-20; 173).

At the termination of respondent's case, petitioner moved for a directed verdict on the grounds that the rendition of an adverse verdict would be unsupported by evidence, and in violation of petitioner's right to freedom of speech and a deprivation of his rights under the due process clause of the Fourteenth Amendment (R. 141). This motion was overruled (R. 141). The verdict returned by the jury was general and did not specify the type of damages awarded nor was any finding of malice made. Petitioner's motion for a new trial made at the conclusion of respondent's case was similarly overruled (R. 141; 179). The latter motion stated that the verdict deprived petitioner of his right to freedom of speech guaranteed by the First Amendment and was contrary to the overwhelming weight of evidence; and excessive damages were a deprivation of due process required by the Fourteenth Amendment (R. 178).

An Assignment of Error was filed in the Supreme Court of Mississippi preserving all points raised below both by motion and by objection (R. 191). On December 16, 1963, the Supreme Court of Mississippi released its opinion affirming the judgment below. It quoted from and adopted the opinion in *Collins* v. *Henry*, 158 So. 2d 28 (App. 17a), in which the court found that the phrase "diabolical plot cooked up" charged respondent with a crime and was, therefore, libelous *per se* and that under the common law rule of libel *per se* applicable in that state, malice need not

be established to sustain an award of punitive damages. Although the court stated that malice was actually established in this case, a reading of the opinion confirms that this finding was based upon the language attributed to petitioner and not upon any evidence relating to petitioner's state of mind.

On January 17, 1964, petitioner filed a Suggestion of Error to the opinion and in further exposition of the violation of petitioner's rights to due process of law, to equal protection of the law, to a fair and impartial hearing and to freedom from interference with First Amendment rights of speech and association and to constitutional insulation from state action, which, in effect, enforces segregation policies and practices (R. 211-212). The Suggestion of Error was overruled on January 27, 1964 (R. 213).

Reasons for Allowance of the Writ

1. The decision of the court below is in conflict with principles enunciated in *New York Times* v. *Sullivan*, — U. S. — (32 U. S. Law Week 4184) decided by this Court on March 9, 1964. Under the *ratio decedendi* of that case a court may not, consistent with First Amendment requirements, award or sanction damages for libel to public officials for criticism of their official conduct unless actual malice is in fact shown. Such an award is state action within the prohibition of the Fourteenth Amendment. *Bridges* v. *California*, 314 U. S. 252; *Shelley* v. *Kramer*, 334 U. S. 1; *Hurd* v. *Hodge*, 334 U. S. 24; *Barrows* v. *Jackson*, 346 U. S. 249; *Wood* v. *Georgia*, 370 U. S. 375.

The court below determined that the statement attributed to petitioner fell within the common law definition of libel per se applicable in Mississippi, and that the privilege usually accorded criticism of public officials for their official conduct was insufficient to negate liability. It held that under Mississippi law, any language which is such as to

"... produce hatred, contempt and ridicule, and to destroy credibility and degrade and lessen confidence and respect ... in the community ... *could only spring from wilfulness and malice or an utter disregard of all moral and ethical action of human conduct*" and is "therefore libelous per se." (Emphasis supplied) (App. 14a).

The finding of malice by the court below does not distinguish this case from *New York Times* v. *Sullivan*, *supra* since malice was inferred from the nature of the words used and not from any evidence reflected in the record. By a process of circuitous reasoning, the court found that petitioner was guilty of libel per se, because his statement tended to produce hatred, contempt and ridicule and to destroy credibility of and confidence in respondent, and because the statement tended to produce this result, actual malice existed (App. 13a-14a; 23a). Application of this principle no more meets constitutional requirements than did reliance on the state statute and the presumption of damages by the Supreme Court of Alabama in *Sullivan*, since it merely restates, as the basis for the finding, the criteria of libel per se, and adheres to the consequent presumption of damages.

The court below, as did the Alabama court in *Sullivan*, regarded proof of truth as the only acceptable defense to respondent's allegations (App. 13a; 33a). Strict insistence that insulation from money damages can be affected only by proving the accuracy of a statement criticizing the public acts of public officials was condemned as insufficient under constitutional standards in the *Sullivan* case. There, this Court stated:

> That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need ... to survive," *NAACP* v. *Button*, 371 U. S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney* v. *Patterson*, 128 F. 2d 457, 458 (1942).

The Mississippi court held that only by establishing that respondent was a "perjurer and had suborned others to perjure themselves" could petitioner escape liability (App. 14a). By interposing its interpretation of petitioner's statement, the Supreme Court of Mississippi went further than that of Alabama which held that the only defense was to persuade a jury to the truth of all particulars stated.

Petitioner's motion to amend the pleadings to include the defense of privilege was denied by the trial court. The making of this motion insulates this case from the rule applied in *Beauharnais* v. *Illinois*, 343 U. S. 25, wherein this Court refused to consider a defense of "fair comment" or privilege since it had not been presented to the courts below. Denial of petitioner's motion was an abuse of discretion and violated his constitutional rights as declared by this Court in *Sullivan*. Just as the state may not, through application of a rule of law, circumscribe comment on public officials, it may not arbitrarily apply rules of practice and procedure to defeat constitutional rights. *Williams* v. *Georgia*, 349 U. S. 375; *Urie* v. *Thompson*, 337 U. S. 163; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 282; *Broad River Power Co.* v. *So. Carolina*, 281 U. S. 537; *New York Central* v. *N. Y. and Pa. Co.*, 271 U. S. 124; *Ward* v. *Love County*, 253 U. S. 17; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673; *Rogers* v. *Alabama*, 192 U. S. 226.

Normally, the right to amend pleadings at the trial, or at the end of the trial to conform to the evidence, is liberally allowed. This rule is applied when the defense of privilege is omitted from the pleadings; *Lee* v. *W. E. Fuetterer Battery & Supplies Co.*, 323 Mo. 1204, 23 S. W. 2d 45; *Broking* v. *Phoenix Newspapers*, 76 Ariz. 334, 264 P. 2d 413. Moreover, this rule is usually applied in Mississippi. *Bigner* v. *Hodges*, 82 Miss. 215, 33 So. 980. See also *Jarnigan* v. *Fleming*, 43 Miss. 710, cited with approval by the court below.

Because of its roots in the Bill of Rights, freedom of speech is more comprehensive than other rights embraced within the due process clause of the Fourteenth Amendment. In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, this Court observed:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.

The privilege accorded criticism of the government and public officials or comment on matters of public concern must extend the area of lawful comment well beyond that delineated for criticism of the private individual. Wide latitude is necessary in determining whether a given statement is within the constitutionally acceptable area since free political discussion which will insure the reponsiveness of government to the will of the populace is essential to a free society and to social growth. See *De Jonge* v. *Oregon*, 299 U. S. 353; *Roth* v. *United States*, 354 U. S. 476, 484.

Although this Court has held that libel, like obscenity, is not within the scope of the First Amendment, that constitutional provision comprehends the right to exaggerate, to disseminate unpopular ideas, and must encompass the

right to posture criticism of official conduct of a governmental official upon the perimeter of offensiveness or even within the ambit of the insulting. See, *Bridges* v. *California, supra, Terminiello* v. *Chicago,* 337 U. S. 1; *Pennekamp* v. *Florida,* 328 U. S. 331.

Petitioner questioned the circumstances surrounding his arrest and the court below held that by doing so, he had accused respondent of the commission of a crime and was, *a fortiori,* guilty of libel. Assuming that a challenge of the authority for official action is reasonably amenable to that construction, the basic issue is whether the First Amendment right to criticize official action is operable within an area limited by the nature of the action criticized.

Criticism of official conduct must concern professional acts, duties and obligations. A law enforcement agent is concerned with the application and enforcement of laws. Exception to the performance of his official acts must involve his professional conduct, hence it is inescapable that any expression of profound disapproval with his methods of operation will reflect on him professionally. Accordingly, the rule of law applied by the court below renders any attempt to take issue with official action vulnerable to a successful libel action and to liability for consequent money damages. If the First Amendment freedom to speak is to fulfill the purpose for which it was adopted, it must protect the right of the private citizen to openly and vocally challenge the performance of official actions and to impute to public officials less than commendable motives.

In contempt proceedings precipitated by editorial or other comments, the scope of the constitutional right of free speech, freedom to express opinions of on judicial action or to criticize public officials is determined by weighing the right against the danger of the obstruction of justice. See *Bridges* v. *California, supra; Pennekamp* v. *Florida, supra.* A similar test which weighs the danger,

that under the circumstances involved, a statement will produce hatred, ridicule and contempt must govern the permissible scope of criticism of the official acts of public officials if the right to dissent and to protest in the area of controversial matters of public concern is to be adequately protected by the First Amendment. And to whatever extent this thesis conflicts with the rationale of *Beauharnais* v. *Illinois, supra,* that case should be limited.

2. The foregoing presumes *arguendo* that the language quoted in the newspapers and attributed to petitioner is libelous in fact. Implicit in ascertaining the existence of libel is whether the ordinary person would be likely to understand the statement as an expression of the opinion of the speaker or writer or as a direct statement of existing fact. See Harper, *Torts,* note 14 at p. 543. Statements challenged as libelous must be judged in relation to the time, the surrounding circumstances and the understanding of the publisher, the public and the community where published. *Massee* v. *Williams,* 207 Fed. 222 (6th Cir. 1913); *Sweeney* v. *Schenectady Union Pub. Co.,* 122 F. 2d 288 (2nd Cir. 1941); *Spanel* v. *Pegler,* 160 F. 2d 619 (7th Cir. 1947); *Holden* v. *American News Co.,* 52 F. Supp. 24 (E.D. Wash. 1943), affd. 144 F. 2d 249 (9th Cir. 1944). *Tidmore* v. *Mills,* 32 So. 2d 769. Petitioner's civil rights advocacy is notorious in the white community in Mississippi, which is engaged in an active and growing battle over racial segregation The record is devoid of evidence that any person or group understood the statement attributed to petitioner as an accusation damaging to respondent monetarily or otherwise. In the State of Mississippi, it is libelous per se to call a white person a Negro. *Natchez Times Pub. Co.* v. *Dunigan,* 221 Miss. 320, 70 So. 2d 681. Accordingly, it is unlikely that, under any circumstances, criticism of a public official by a known Negro civil rights activist, could fall within a definition of libel.

3. These actions were brought by public officials of a southern state conceived in segregation and dedicated to

the principle that it shall be preserved.[1] See *United States* v. *City of Jackson*, 318 F. 2d 1, (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F. 2d 201 (5th Cir. 1963); and *Meredith* v. *Fair*, 298 F. 2d 696, (5th Cir. 1962), where this fact was judicially noticed by the court.

Significantly, although five newspapers printed petitioner's statement and two wire services disseminated similar stories, only petitioner was sued for libel. Previously respondent has used legal process to terminate expressions of protest against and satiation with Mississippi's racial practices on the part of petitioner and his associates.[2] This Court is aware of the racial climate in the

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[1] See Mississippi Constitution, § 225; Mississippi Code of 1942, Ann., § 7786 (segregation of races on streetcars and buses); §§ 4259, 7913, 7965, 7971, (segregation of races in prisons); §§ 6882, 6883 (separate mental wards); § 2351.5 (separate rest rooms in railroad and bus station waiting rooms for interstate passengers); § 2056(7) (punishes any conspiracy to violate the segregation laws of the state); § 3499 (unlawful for taxicabs to transport whites and Negroes together); § 7787.5 (requires construction of separate waiting rooms by all common carriers for intrastate passengers); § 2339 (misdemeanor to publish or advocate the social equality of the races); and § 4065.3 which requires all state officials to utilize their office to maintain segregation of the races.

[2] In January, 1962, petitioner was charged with violation of a "restraint of trade" statute for participating in a "protest" selective buying campaign. *State* v. *Henry*, No. 5245, now pending in the County Court of Coahoma County. Subsequent to the morals charge and these ensuing libel actions, petitioner's wife was discharged from the county school system. The Superintendent testified that her discharge was due to the morals charge, the libel actions and that he had "heard" that an action for fraudulent conveyance of property would soon be brought against her. *Noelle Henry* v. *Coahoma County Board of Education*, — F. Supp. — (8 Race Rel. Rep. 1480, decided December 23, 1963). What the Superintendent heard was prophetic and on May 15, 1962, Thomas Pearson filed a complaint for fraudulent conveyance against petitioner's wife. *Pearson* v. *Henry*, No. 13206, Chancery Court of Coahoma County, Mississippi. See also pages 19-21 of the petition for writ of certiorari filed in *Henry* v. *Mississippi*, Case No. 539. It is significant that these events and petitioner's arrests by Police Chief Collins on the charge of "parading without a permit," for picketing in peaceful demonstrations are termed "several other clashes with the law" by the court below (App. 20a).

South and of the use of criminal and civil process to maintain a segregated society. As was stated in *NAACP* v. *Alabama*, 357 U. S. 449, at p. 460:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and *state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.*

and at p. 461:

> The governmental action challenged may appear to be totally unrelated to protected liberties. (Emphasis supplied)

Time and the evolution of the law have taught that the more primitive methods of stifling the voices of dissent and discontent with racial segregation have adverse national and international repercussions and are rarely tolerated by the appellate courts. As a result, more sophisticated means are utilized. There is little risk in resort to legal process and to jury trials in the rural south when whites are pitted against Negroes. Litigation, then, offers a reasonable means to achieve the desired result.

The Fourteenth Amendment prohibits "state action" and it is well settled that a state acts through its instrumentalities; its executive, judicial and legislative branches. *Shelley v. Kramer, supra; Monroe* v. *Pape*, 365 U. S. 167. It acts no less through its agents and employees. *Peterson* v. *City of Greenville*, 373 U. S. 244; *Lombard* v. *Louisiana*, 373 U. S. 267. It must follow that actions which offend this constitutional prohibition binding on the state can be no less proscribed when disguised as libel suits. Constitutional rights may not be nullified by evasive schemes

whether attempted "ingeniously or ingenuously." See *Cooper* v. *Aaron*, 358 U. S. 1; *Gomillion* v. *Lightfoot*, 364 U. S. 339; *Smith* v. *Allwright*, 321 U. S. 649.

4. The important issues here raised which demand resolution by this Court can not be minimized by labeling this case a private libel action. The court below has allowed the civil charge of libel to become a device for the suppression of criticism of the administrators of government.

The essential issue is the right of the oppressed individual to express dissatisfaction with and a lack of confidence in public officials who have conducted their offices to the fundamental disadvantage of citizens who have voiced disapproval with accepted traditions.

The struggle of the Negro for recognition of his civil rights has reached a new peak of activity, bringing forth strong declarations and denunciations from both sides of the fray. Statements, claims, disclaimers and accusations have taken vehement form as passions are released and both government and those who would change governments collide in the arena of opinion. Foreclosure of the right to criticize or even condemn the government and its officials strikes at the very heart of a democratic society. Repeatedly, this Court has recognized the primacy of unfettered discussion and debate on the issues of government, *De Jonge* v. *Oregon*, *supra*.

Transmutation of libel into an instrument to restrain and render mute criticism of the government and its administrators, destroys those liberties which the First Amendment was designed to protect.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

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Appendix A

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,758

AARON E. HENRY

vs.

THOMAS H. PEARSON..

KYLE, Justice:

This case is before us on appeal by Aaron E. Henry, defendant in the court below, from a judgment of the Circuit Court of Coahoma County rendered in favor of Thomas H. Pearson, plaintiff, in an action for damages for libel. The case is a companion case to the case of Henry v. Collins, No. 42,759, which was decided by this Court on December 2, 1963 (— So. 2d —).

The plaintiff's action for libel was based on a letter written by the defendant to W. C. Norwood, the deputy sheriff of Bolivar County, containing references to the plaintiff, who was county attorney of Coahoma County, and a statement communicated by the defendant to Lloyd B. Jeffers, a news reporter in the employ of United Press International news agency, under circumstances said to insure its being printed in those newspapers in Mississippi which subscribed to its service, and a statement communicated by the defendant to Van H. Savell, a news reporter in the employ of the Associated Press, under circumstances said to insure its being published in those newspapers in Mississippi which were members of the Associated Press.

The letter written by the defendant to W. C. Norwood, deputy sheriff of Bolivar County, was dated March 6, 1963. In his letter the writer thanked the deputy sheriff for the fair manner in which he was treated while he was in custody as a prisoner on Saturday night, March 3, 1962. The writer then stated in his letter to Norwood the following:

> "You will probably see in print where I have filed a complaint with the Justice Department charging a denial of Civil Rights in the arrest itself. The complaint states that in my opinion the charge under which I was arrested was born in the minds of the County Attorney and the Chief of Police of my town due to my activity in the area of desegregation, registering and voting and politics as I serve on the committee of the Trammel to Congress Committee, sponsoring a Negro for Congress. Also these two men are against me due to my activity in suggesting to Negroes that we all trade in those stores that employ us and hire us above the menial level.
>
> "What I want to be clearly understood that I am not charging nor am I of the opinion that you nor any other authority of Bolivar County is a party to this diabolical plot. I do think that the two men above mentioned has schemed with some person to make the charge in Bolivar County and unknowingly Bolivar County is being used to some extent as a party in the Racial difficulties of Coahoma County . . . ."

The statement which was communicated by the defendant to Lloyd B. Jeffers, a news reporter in the employ of U.P.I. and which was sent by U.P.I. to the Clarksdale Press-Register, The Daily Corinthian, The Delta Democrat-Times, and The Meridian Star, and published by each of

those newspapers in its edition of Wednesday, March 7, 1962, is as follows:

> "Clarksdale, Miss. (UPI)—Aaron Henry, state president of the National Association for the Advancement of Colored People said Tuesday night he had asked the FBI to investigate his arrest on Saturday on a morals charge.
>
> "Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.
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> "He was arrested Saturday night by Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.
>
> "* * *
>
> "Henry called the arrest 'a diabolical plot cooked up' by the Coahoma County prosecutor, Thomas H. Pearson, and Collins * * *."

The statement which was communicated by the defendant Henry to Van H. Savell, news reporter in the employ of the Associated Press, and incorporated in a news item which was sent by the A.P. to the Vicksburg Evening Post and The Biloxi-Gulfport Daily Herald, and published in each of those newspapers on March 7, 1962, was substantially the same as that given to the representative of the U.P.I.

The plaintiff filed his declaration on April 25, 1962, and in his declaration charged that the statements made by the defendant in his letter to W. C. Norwood, deputy sheriff of Bolivar County, dated March 6, 1962, and the statements communicated to the news reporters of United Press International and the Associated Press in the City of Jackson concerning the plaintiff were false, defamatory and libelous,

and the publications thereof by the defendant were unprivileged, and directly, without qualification, accused the plaintiff of misconduct and malfeasance in office as the county prosecuting attorney of Coahoma County, and unequivocally attributed unto the plaintiff as an attorney at law a gross violation of the Code of Ethics of the legal profession; and that the natural and proximate consequences of said publications had caused and would necessarily thereafter cause injury to the plaintiff in his personal, social, official, business and professional life, thereby exposing him to public hatred, contempt and ridicule, and causing irreparable damage and injury to his reputation and good standing in the community. The plaintiff therefore demanded judgment for damages in the amount of $25,000. Copies of the letter addressed to Mr. Norwood, deputy sheriff of Bolivar County, and the above mentioned news releases of the U.P.I. and A.P. dated March 6, 1962, and published in the above mentioned newspapers, were attached as exhibits to the plaintiff's declaration.

The defendant in his answer admitted that he wrote the letter which was addressed to W. C. Norwood, deputy sheriff of Bolivar County, but denied that the letter was maliciously prepared and further denied that it was defamatory and libelous. The defendant also denied that he had malicously prepared and published of and concerning the plaintiff false statements by deliberately communicating the same to the officers of the U.P.I. and the A.P. in Jackson, as alleged in the plaintiff's declaration. The defendant denied that he had communicated to the U.P.I. and A.P. false defamatory and libelous statements; and the defendant denied that he had caused to be published any unprivileged publications, which accused the plaintiff of misconduct and malfeasance in office, or which attributed to the plaintiff, as an attorney at law, a gross violation of the Code of Ethics of the legal profession; and the defendant further denied that, as a natural and proximate consequence of any statements published by him, injury

had been caused or would thereafter be caused to the plaintiff in his personal, social, official, business and professional life.

The case was tried before a jury at the July 1962 term of the court; and the jury returned a verdict in favor of the plaintiff for the sum of $25,000. The court overruled the defendant's motion for a new trial, and a judgment was entered in favor of the plaintiff against the defendant for the amount stated in the verdict of the jury. From that judgment the defendant has prosecuted this appeal.

The appellant has assigned and argued four points as grounds for reversal of the judgment of the lower court: (1) That the court erred in overruling the defendant's challenge of the juror, L. R. Allen, for cause; (2) that the court erred in overruling the defendant's motion for a directed verdict at the close of the plaintiff's case; (3) that the court erred in overruling the defendant's motion to amend the answer so as to allege the defense of qualified privilege by reason of "fair comment;" and (4) that the court erred in denying defendant's motion for a new trial.

In view of the nature of the questions presented for our decision on this appeal, it is necessary that we give a brief summary of the evidence upon which the jury based its verdict. We shall not undertake to review in detail the testimony of each of the witnesses who testified concerning the events which led up to the appellant's arrest by the Chief of Police of the City of Clarksdale on a warrant isued by the Bolivar County justice of the peace, or the testimony of the news reporters of the U.P.I. and the A.P., who testified concerning the telephone calls which the appellant made to them on March 6, and the statements read by the appellant to them concerning his arrest on the disorderly conduct charge which he characterized as a "diabolical plot cooked up by the county prosecutor, Thomas H. Pearson, and Collins." The evidence relating to the appellant's arrest by the Chief of Police of the City of Clarksdale on the warrant issued by the Bolivar County

authorities on March 3, 1962, and the evidence relating to the telephone conversations which the appellant had with the representatives of the news agencies on March 6, 1962, which resulted in the publication of the appellant's statements in the Clarksdale Press Register, the Biloxi-Gulfport Daily Herald, The Daily Corinthian, The Delta Democrat Times, and the Vicksburg Evening Post, has been clearly summarized in the opinion of Judge Lee in the Collins case; and a restatement of the evidence on those points need not be made by us in this opinion.

Other parts of the testimony which are directly applicable to the issues presented for our consideration on this appeal may be summarized as follows:

The appellant Aaron E. Henry, who was called to testify as an adverse witness by the plaintiff, admitted that he had written the letter referred to in the pleadings, addressed to W. C. Norwood, Deputy Sheriff of Bolivar County, and dated March 6, 1962, and had mailed the letter to Norwood at Cleveland, Miss. The appellant also stated that, on March 6, 1962, he returned telephone calls and gave statements concerning his arrest to representatives of the U.P.I. and A.P. news agencies at Jackson, Mississippi; that one of the news agencies had called him on the telephone about a report that he had made a statement to the Federal Bureau of Investigation concerning his arrest; and after finding out there was nothing further the Justice Department wanted concerning the report, he discussed the report which he had made to the F.B.I. with the representatives of the news agencies. The appellant was asked to read the statement published by the U.P.I. under date of March 6, 1962, and was then asked to state whether he gave that statement to the representative of the U.P.I. His answer was, "The statement was written—some of it, was taken out of context, but not all of it." He admitted that he told the representative of the U.P.I. that he had been arrested on the morals charge and there was no basis for it, and "that I thought it was a scheme to degrade me, and

the words 'diabolical plot' were developed as he and I discussed it." He stated that he did not recall whether he said "diabolical plot" or just how it came about, but the words "diabolical plot" were not included in the statement that he filed with the F.B.I.

The appellant was then asked the following questions and gave the following answers: "Q. * * * Didn't you tell the representative of the U.P.I., who happened to be Mr. Lloyd Jeffers, in that conversation that I referred to, that 'your arrest was a diabolical plot cooked up by the Coahoma County Prosecutor, Thomas H. Pearson, and Chief of Police Ben Collins'? A. I am saying that I don't know whether I talked to Mr. Jeffers at all, or no. Q. Well, whoever you talked to, did you make that statement to them? A. No. The 'diabolical plot' phrase grew out of as much his suggestion as it was mine. Q. Well, did you have any part in the description of it as 'a diabolical plot'? 'Cooked up by Mr. Pearson and Mr. Collins'? A. I don't recall the phrase 'cooked up' at all, but I do recall that as we discussed this thing, that the word 'diabolical' was used, but I don't recall whether the word 'plot' was used or not. Q. Were they used by you? A. They were used in the discussion of it with him."

Similar answers were given to questions propounded by the plaintiff's attorney concerning the statement published by the Associated Press. The appellant admitted that he had used the words "diabolical plot" in his letter to Mr. Norwood dated March 6, 1962. He stated that he was talking about the chief of police and county prosecuting attorney, whoever they happened to be.

Manuel Nassar, Deputy Sheriff of Bolivar County, and deputy marshal for the Town of Shelby, testified concerning the complaint made by Sterling Lee Eilert before a justice of the peace in the Town of Shelby around 5:00 P.M. on March 3, 1962, and the issuance of the warrant for the arrest of Aaron E. Henry on a disorderly conduct charge.

Ben C. Collins, chief of the police department of the City of Clarksdale, testified that he first became aware of the fact that a warrant had been issued for the arrest of Henry when he heard the Shelby Police Department call the Clarksdale Police Department and inform the Clarksdale Police Department that a warrant had been issued by the Bolivar County Justice of the peace for the arrest of Henry. He got the news over the radar machine, and he called officer Henry Petty and directed him to be on the lookout for Henry, and if he saw Henry's car to keep him under surveillance until a warrant could be sent to Clarksdale. He also instructed the desk sergeant to call Shelby and advise them to send the warrant to Clarksdale and the Clarksdale Police Department would try to locate the appellant. Collins stated that at that time he did not know the nature of the charge which had been made against Henry; but soon thereafter the warrant for Henry's arrest was received, and Collins instructed the desk sergeant to call Officer Petty and have him stand by until he could bring the warrant over and make the arrest. Collins stated that up to that time he had not discussed the warrant with Mr. Pearson, the county attorney, and so far as he knew, the county attorney knew nothing about his activities in the matter, Collins took the warrant and made the arrest at the appellant's home. The appellant asked what the charge was, and Collins told him that the warrant stated that the charge was "disorderly conduct." The appellant then read the warrant. Collins stated that, on the way back to the jail, before he locked the appellant up, he called the police department and directed that the Bolivar County authorities be notified immediately that the appellant was in custody and to send officers for him.

Collins stated that, when he arrived at the police headquarters, the desk sergeant told him that the mayor wanted to talk to him on the telephone. Collins called the mayor, and the mayor came down to the city hall. Collins told the mayor about the warrant which had been issued by

the Bolivar County justice of the peace, and the appellant's arrest. Collins did not know whether the offense, if any, had been committed across the county line in Bolivar County or in Coahoma County. The mayor advised Collins to call the county attorney, and ask him to come to the city jail. The county attorney was called on the telephone and came to the city jail. Collins was asked whether Mr. Pearson at any time prior to the arrest ever discussed the matter with him, "or did you engage in a plot with him." His answer was, "None whatever." He stated that neither he nor Pearson knew anything about the matter until after the affidavit had been made against the appellant in Bolivar County and a warranf had been issued for the appellant's arrest. Collins stated that the reason he made the arrest personally was because the appellant had been arrested before, and every time he was arrested he always hollered "persecution", and Collins wanted to make the arrest himself to make sure that there was no such thing as persecution involved in the case.

W. Kincade, Mayor of the City of Clarksdale, testified that he received information about the arrest of Henry some time before dark; that he went to the city jail and interrogated the white boy, Sterling Lee Eilert, and he then decided that it was necessary to call the county attorney, for the reason that the charge against Aaron was not a charge of the city. He therefore directed the chief of police to call the county attorney. So far as the mayor knew, Pearson had no knowledge of Henry's arrest until he was called on the telephone by the chief of police.. The mayor stated that he talked to Mr. Pearson himself when the telephone call was made, and he told Mr. Pearson that he thought he should come down to the police station; that Pearson was reluctant to come to the police station for the reason that he had another appointment for the evening, but he came, as requested by the mayor, and questioned the boy Eilert and also the defendant Henry;

and that he had a tape recorder which he used during the time he was questioning each of the parties.

The plaintiff Pearson, testifying in his own behalf, testified that Collins called him on the telephone at his home about 7:45 P. M. and told him that Aaron Henry had been arrested on a disorderly conduct charge, and Collins asked him to come to the city jail. Pearson stated that he knew nothing about the arrest of Henry until he received the call from the chief of police; that he and his wife had planned to go with another couple to a dance; but he went to the police station immediately. Kincade and Eilert were there when he arrived. He talked to Eilert, and he interrogated the defendant. Pearson stated that he had never seen Eilert before, and he knew nothing about him; and after talking to him he decided to get his tape recorder and take down all of the statement on the tape recorder. After taking statements from the parties, it appeared to him that no criminal offense had occurred in Coahoma County; and he therefore left the police station. He had never discussed with Collins or the boy Eilert a plot against Aaron Henry.

On cross-examination by the defendant's attorney, Pearson was asked, whether he ever, at any time, had occasion to question the defendant about his activities with the NAACP. In answer to that question Pearson stated that several months before the trial Henry and several other persons had been arrested and charged with conspiring to withhold trade from down-town merchants in Clarksdale; that prior to the arrest of the defendants on that charge he had talked to Henry and the others about the boycott and the law which made it a criminal offense for persons to conspire to commit acts injurious to public trade; that he told them that in his opinion the boycott was definitely injurious to public trade, and he felt that the boycott should cease, so that the city could have a normal Christmas trading season. Henry failed to heed his advice and admonition, and he made an affidavit against Henry for a violation of the law.

Stanny Sanders, an attorney of Greenwood, Mississippi, who had served as district attorney for the Fourth Judicial District for a period of 11 years and as Complaint Commissioner of the Mississippi State Bar, testified that in his opinion the charge that a county attorney and policeman had "concocted a diabolical plot" to bring about the arrest of a citizen on a morals charge would impute a crime to the county attorney, and even if unproved would injure his reputation and lower him in the public's esteem and confidence.

At the conclusion of the plaintiff's evidence the defendant was recalled to testify as a witness in his own behalf, and on direct examination by his attorney, the defendant was asked whether he had had any personal contacts with Mr. Pearson prior to March 3, 1962. In answer to that question, the defendant stated that, going back about three years, when Mr. Pearson was a candidate for county attorney, Mr. Pearson called on him to solicit his help in getting elected, and during the conversation which he had with Mr. Pearson at that time "it developed that Mr. Pearson and I were pretty wide apart about the rights of Negroes, and we couldn't come to any understanding as to whether we would support him or not." The defendant also stated that, at another time, when three young people were arrested for having decided that they could use any part of the local train station they desired, Mr. Pearson called him to his office to talk to him about that; and Mr. Pearson stated to him that the children would not have gone down there if they had not been encouraged by him and other adults. The defendant also recalled that on December 6, 1961, Mr. Pearson had Mr. Collins arrest him for an alleged violation of the anti-boycott statute. The defendant was later asked the following question, and gave the following answer: "Q. Now, based on the contact which you said you had with the plaintiff, Mr. Pearson, has it been your feeling that you were or were not being harassed by Mr. Pearson? A. I would say I

have been harassed by him." The defendant stated that, when he wrote the letter to Mr. Norwood and made the statements to the newspaper reporters referred to above, he felt that some answer to the charge which had been made against him was necessary; that he was not mad at Mr. Pearson at the time he wrote the letter to Mr. Norwood and made the statements to the news agencies, and he was not mad at him at the time of the trial; but, since the crime was alleged to have been committed in Bolivar County, he felt that Mr. Pearson acted improperly in interrogating him in Coahoma County.

Four witnesses were called to testify on behalf of the defendant on the question whether the plaintiff had suffered actual damage to his reputation as a result of the publication of the libelous charge against him. H. Y. Hackett, an insurance agent of Clarksdale and J. M. McMillian, who operated a laundry in the City of Clarksdale, testified that they had read the newspaper article relating to the statement made by Henry concerning Mr. Pearson, and the article had not affected their opinions of Mr. Pearson. Reverend J. D. Rayford, who had lived in Clarksdale about 20 years, testified that he had read the article which appeared in the Clarksdale Register, and he did not think the article would cause any of Mr. Pearson's clients to refrain from employing him as an attorney. Dr. Luther McCaskill, a physician who lived in Clarksdale, also testified that he had read the article published in the Clarksdale newspaper, and it had not changed his opinion of Mr. Pearson; that it was his opinion that any statement Henry might have made about Mr. Pearson would have enhanced Mr. Pearson's reputation, because he was for integration and Mr. Pearson, like most people in the county, was a pro-segregationist.

We think there is no merit in the appellant's contention that the court erred in overruling the defendant's challenge of the juror L. R. Allen for cause.

The record shows that Allen on his voir dire examination stated that he was married, but had no children; that he

was a member of the Christian Church; that he knew counsel for the plaintiff; and that Mr. L. L. Porter, Jr., was handling a case for his company at the time of the trial. The defendant's attorney challenged the juror for cause. Allen was then asked whether he could try the case fairly and impartially upon the law and evidence and that alone, and a just verdict return. His answer was that he could. He then stated that he had no malice or ill will against the defendant, and that he had no desire to reach any verdict except that verdict to which the evidence directed his mind. The court overruled the defendant's challenge of the juror for cause. The record shows that the court did not restrict defense counsel in any way in his examination of the other jurors. Each side exercised four peremptory challenges; and the juror Allen was not one of the jurors who tried the case. The company that Allen worked for was not a party to the suit; and in our opinion Allen was not disqualified to serve as a juror merely because one of the plaintiff's attorneys was representing his company in some other litigation at the time of the trial.

We also think there was no error in the action of the trial judge in overruling the defendant's motion for a directed verdict at the close of the plaintiff's case, or in the action of the trial judge in overruling the defendant's motion, at the conclusion of all of the evidence, for leave to amend his answer to the plaintiff's declaration so as to allege, as an additional defense, qualified privilege based on fair comment.

Similar errors were assigned and argued without avail as grounds for reversal of the judgment of the lower court in the Collins case, and what was said in the Collins case on the two points mentioned is applicable to the facts in this case.

In answer to the appellant's contention that he was entitled to a directed verdict in the Collins case, Judge Lee, after commenting upon the appellant's charge that his

arrest was the result of a "diabolical plot" cooked up by Pearson and Collins, in his opinion said:

> "Thus, if human testimony is to be believed, there was no semblance of justification or excuse for the utterance and publication of these statements. It is evident that the purpose was to create a defense of the charge for which he was arrested and to do this by charging the appellee and the other officer with 'cooking up a diabolical plot' against him, meaning thereby that these officers were perjurers and had suborned others to perjure themselves. In other words, by this libel, these officers were charged with the commission of a loathsome and reprehensible crime, a crime so revolting as to produce hatred, contempt and ridicule, and to destroy credibility and degrade and lessen confidence and respect for them in the community. Such statements could spring only from wilfulness and malice or an utter disregard of all moral and ethical actions of human conduct. These statements were therefore libelous per se.
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> "* * *.
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> "If actionable per se, general damages need not be pled or proved, but are presumed to result. Travis v. Hunt, 224 Miss. 193, 79 So. 2d 734; Natchez Times Pub. Company v. Dunigan, supra; and the cases with which those opinions are documented.
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> "But malice was actually established in this case * * *.
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> "Under the evidence, there was clearly such publication in the newspapers and by letter as to fasten liability upon the appellant. See 53 C.J.S., Libel and Slander, Sec. 85, p. 137, where it says in part: 'The author of the defamation is liable for any secondary publication which is the natural conse

> quence of his act; and this rule applies both to libel and slander.' See also 33 Am. Jur., Libel and Slander, Sec. 197, p. 185, of like effect; Newell, Libel and Slander, 4th Ed., p. 339. Manifestly, the case, on the merits, was properly submitted to the jury, and the requested peremptory instruction was properly refused."

The appellant's contention that the court erred in overruling the appellant's motion for leave to amend his answer so as to allege as an additional defense qualified privilege based on fair comment, has likewise been fully answered in the opinion rendered in the Collins case; and it is not necessary that we repeat here what was said in the Collins case on that point.

One other question remains to be considered by us on this appeal, and that is the question whether or not the amount of damages awarded by the jury is so excessive as to require a reversal of the judgment and the granting of a new trial on that account. This Court has frequently stated that, in an action for libel or slander, the question as to the amount of damages to be awarded is peculiarly one for the jury. It is rarely the case that the compensatory damages to which the plaintiff is entitled in a case of this kind can be adequately measured by the extent of his pecuniary loss and, when malice is shown as in this case, exemplary damages may be awarded; and the amount of such damages awarded by the jury will not be disturbed by the court on appeal unless the amount is so excessive as to indicate bias or prejudice on the part of the jury.

The Court, in discussing the amount of the verdict in the Collins case, said:

> "Under the law, damage is presumed to result from a malicious libel and, of course, it followed from the publication of this malicious libel. Reckless negligence in the infliction of a personal injury would afford a remedy to the victim. As was said in

> Jarnigan v. Fleming, supra (43 Miss. 710), 'Character is far more sacred than property, and should be protected by courts and juries with watchful care. Persons who injure the character of others, ought to be no less answerable to justice than those who injure property.' "

According to the evidence in this case the appellee was 32 years of age, was married and he and his wife had four children. The appellee graduated from Clarksdale High School in 1947. He attended University of Mississippi Law School thereafter, and obtained a law degree in 1951. He was admitted to the Bar and elected county attorney of Coahoma County in 1951, and served as county attorney for four years. He was defeated for reelection in 1955, but was again elected county attorney in 1959 for a second four-year term. His salary as county attorney was $4200 a year, and he expected to be a candidate for reelection in 1963. In addition to serving as county attorney, the appellant had been engaged in the general practice of law in the City of Clarksdale since 1952; and a large part of his practice had been derived from members of the colored race.

In view of the facts disclosed by the record we think that it cannot be said that the verdict in this case is so grossly excessive as to evince bias and prejudice on the part of the jury.

We find no reversible error in the record, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

LEE, *P.J.*, AND MCELROY, RODGERS AND JONES, *JJ.*, CONCUR.

Appendix B

IN THE

SUPREME COURT OF MISSISSIPPI

No. 42,759

AARON E. HENRY,

vs.

BENFORD C. COLLINS.

LEE, Presiding Justice:

This is a libel action, instituted by Benford C. Collins against Aaron E. Henry in the Circuit Court of Coahoma County, to recover damages on account of the publication of a false and defamatory charge against the plaintiff. There was a verdict for the plaintiff in the sum of $15,000, and the defendant has appealed.

The declaration charged that the defendant, on the 6th day of March 1962 maliciously prepared, composed and published a libelous writing to Mr. Norwood, Deputy Sheriff of Bolivar County, which contained a malicious libel against the plaintiff. It was also charged that the defendant, in like manner, made such charges to the United Press International News Bureau and the Associated Press News Bureau with express intent for these agencies to publish, republish, communicate, and circulate the statements among their subscribers throughout the State of Mississippi and the other states of the United States. Copies of the alleged false statements were attached to the declaration as exhibits. It was also alleged that these

statements attributed to the plaintiff a gross violation of the law and his duties, and caused injury to him in his personal, social, official, business and professional life, thereby exposing him to public hatred, contempt and ridicule, with great damage to his reputation and good standing in the community.

The answer of the defendant admitted that he wrote the letter in question but that it was not maliciously prepared; and denied that the letter was false, defamatory and libelous. He likewise denied that he maliciously prepared and caused to be published the alleged communications to the press organizations and their subscribers; and denied that the plaintiff was injured in any way by reason of the publication.

Manuel Nasser, a Deputy Sheriff of Bolivar County and Deputy Marshal of the Town of Shelby, and Charlie Reynolds, a police officer of Clarksdale, on March 3, 1962, upon returning to the city hall in Shelby, after their efforts to locate a witness in a lawsuit, were accosted by Sterling Lee Eilert, who appeared to be scared, shaking and pale. He complained about an incident which had occurred in a black Star Chief Pontiac automobile, with a tag number ending in 1769, as he was hitchhiking from Memphis, Tennessee. These officers, in an effort to identify the automobile, called the Clarksdale Police Department, and were advised that Aaron Henry was the owner of a 1961 Pontiac automobile bearing License Tag No. C 14-1769. Eilert thereupon made an affidavit before V. E. Rowe, a Justice of the Peace, charging Henry with disorderly conduct. The Justice of the Peace issued a warrant for the arrest of Henry on that charge and delivered it to Reynolds for transmission to the authorities in Clarksdale. When the warrant was received at Clarksdale, the plaintiff, the Chief of Police, went to the defendant's home and advised him that he was under arrest on a charge of disorderly conduct and gave him a copy of the warrant. When Collins delivered his prisoner to the city jail, Mayor W. S. Kincade,

who was at the police station, talked to Eilert, and directed Collins to call the County Attorney, Pearson, to come to the city hall for the purpose of an interrogation. With great reluctance, because he was preparing to go to a social activity, the county attorney went to the city hall and talked to the parties in order to ascertain where the alleged crime had actually occurred. To that end, he took tape recordings of the statements of Eilert, Clifford Smith, Noelle Henry, wife of the appellant, and appellant himself. When he had concluded the interrogation, the county attorney was of the opinion that no criminal offense had been committed in Coahoma County. The appellant was then turned over to Bolivar County officials.

On March 6, two days after his release, appellant wrote the letter complained about to Deputy Sheriff Norwood. Because of its length, the same is not set out verbatim. However, it advised the officer that he had filed a complaint with the Department of Justice, charging a denial of civil rights because of his arrest. Henry stated that the arrest "was born in the minds of the county attorney and the chief of police due to his activity" in certain areas. The letter told the officer that "I am not charging nor am I of the opinion that you nor any other authority of Bolivar County is a party to this diabolical plot. I do think that the two men above-mentioned (the county attorney and the chief of police) have schemed with some person to make the charge in Bolivar County" etc.

The statements which the defendant made to United Press International and the Associated Press, on the same date as the letter, were prepared by the appellant and read over the telephone to the representatives of the two press agencies. In each instance, defendant referred to his arrest on the charge of making immoral advances toward a male person in a claim that this was an attempt to discredit him. He called the arrest "a diabolical plot cooked up" by

Coahoma County Attorney Pearson and Clarksdale Police Officer Ben Collins. The representatives of the press agencies, in each instance testified that the appellant expressed the desire to read the statement to them, that he did so, and that they were particularly careful to write down his exact language. These statements were forwarded to subscribers and were published in the Clarksdale Press Register, the Biloxi-Gulfport Daily Herald, the Daily Corinthian, the Delta Democrat Times, and the Vicksburg Evening Post.

The appellant, forty years of age and a pharmacist, admitted that he wrote the letter to Mr. Norwood. He knew that the press agencies gathered and carried news items over the country, as he had previously given items to them. He admitted that he used the two words "diabolical plot" in his letter. But, in an effort to explain his use of the words in the letter and statement, he said that they constituted his opinion of what the acts amounted to, and they were not uttered as a result of malice. He admitted that he had experienced several other clashes with the law. His witnesses said that they believed that the appellant would tell the truth, but they did not think the publications resulted in any harm to the appellee.

The evidence showed that neither *Nasser nor Pearson* had ever seen Eilert prior to the time that he approached them in Shelby, and, successively, in the city hall at Clarksdale. Collins knew nothing of the events in Shelby until the message was received over the radio that a warrant had been issued for appellant's arrest. The evidence showed positively that no one had framed the defendant or "cooked up" any plot, diabolical or otherwise, to have him arrested on a morals charge. There was no contact between Collins and Pearson until Mayor Kincade directed Collins to call Pearson and tell him to come to the city hall.

The appellant assigns a number of alleged errors as grounds for a reversal, and these will be taken up and disposed of in the order in which they may be listed.

On the question of whether or not the appellant was entitled to a peremptory instruction at the close of the case, a proper evaluation of the evidence is as follows:

Some of the meanings of the expression "cook up", from their common acceptation, are "to make up: devise or fabricate often factitiously as an expedient: prepare, concoct, improvise—usu. used with up * * *" and "to alter to convey an untrue impression: falsify, doctor, angle, manipulate." Webster's 3rd New International Dictionary, Unabridged.

"Diabolical", in like manner, may mean "Of or relating to the devil or devils: being under the influence of devils: resembling a devil: devilish, fiendish." Webster's 3rd New International Dictionary, Unabridged.

"Plot", in like manner, may mean "conspiracy, intrigue." Webster's 3rd New International Dictionary, Unabridged.

Thus, if human testimony is to be believed, there was no semblance of justification or excuse for the utterance and publication of these statements. It is evident that the purpose was to create a defense of the charge for which he was arrested and to do this by charging the appellee and the other officer with "cooking up a diabolical plot" against him, meaning thereby that these officers were perjurers and had suborned others to perjure themselves. In other words, by this libel, these officers were charged with the commission of a loathsome and reprehensible crime, a crime so revolting as to produce hatred, contempt and ridicule, and to destroy credibility and degrade and lessen confidence and respect for them in the community. Such statements could spring only from wilfulness and malice or an utter disregard of all moral and ethical actions of human conduct. These statements were therefore libelous per se.

In Conroy v. Breland, et al., 185 Miss. 787, 189 So. 814, the opinion said: "At common law any written or printed language which tends to injure one's reputation,

and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community is actionable per se. Hodges v. Cunningham, 160 Miss. 576, 581, 135 So. 215; Wrought Iron Range Company v. Boltz, 123 Miss. 550, 558, 86 So. 354; and no special damages are necessary to be alleged or shown in order to prevail against a demurrer, or a motion to exclude. 3 Rest., Torts, Sec. 569. The statement of the rule, as set forth in this paragraph, must not be confused with that more precisely applicable to slander or oral defamations, and must, of course, be taken in connection with the further rule, prevailing in this State, that the truth of the matter alleged to be defamatory, whether in slander or in libel, is a good defense. Neely v. Payne, 126 Miss. 854, 89 So. 669; 36 C. J., pp. 1231, 1232, and cases there cited."

The Hodges and Boltz cases, cited in the above quotation, as well as Hines v. Shumaker, 97 Miss. 669, 52 So. 705, fully document the above statement. In Hines v. Shumaker, supra, the Court said:

"Appellant sought by their pleadings and proof to qualify the language of the letter, by pleading and endeavoring to prove that the letter did not charge, and was not intended to charge, generally, dishonesty to the plaintiff. But the question for the court to determine is, not what language the appellants meant to use, but what did they mean by the language actually employed?" See also Great A. & P. Tea Company v. Majure, 176 Miss. 356, 167 So. 637; and Natchez Times Pub. Company v. Dunigan, 221 Miss. 320, 72 So. 2d 631, the latter also pointing out that, the article being libelous per se, malicious intent is not even necessary to sustain the action, citing Jarnigan v. Fleming, 43 Miss. 710; Rodgers v. Kline, 56 Miss. 808; Upton v. Times Pub. Company, 104 La. 141, 28 So. 970.

If actionable per se, general damages need not be pled or proved, but are presumed to result. Travis v. Hunt, 224 Miss. 193, 79 So. 2d 734; Natchez Times Pub. Company

v. Dunigan, supra; and the cases with which those opinions are documented.

But malice was actually established in this case. See Kroger Gro. & Bak. Company v. Harpole, 175 Miss. 227, 166 So. 335, where it was said: "Malice in fact relates to the state or condition of the mind of a person who speaks defamatory words. It includes an intention to injure, hatred, or ill will, but is not limited thereto, and appears if words of the character here under consideration were spoken wantonly and in disregard of a civil obligation, i.e., if they were spoken recklessly without knowing or caring whether they were true. This is in accord with practically all of the authorities." See also Reliance Mfg. Company v. Graham, 181 Miss. 549, 179 So. 341.

Under the evidence, there was clearly such publication in the newspapers and by letter as to fasten liability upon the appellant. See 53 C.J.S., Libel and Slander, Sec. 85, p. 137, where it says in part: "The author of the defamation is liable for any secondary publication which is the natural consequence of his act; and this rule applies both to libel and slander." See also 33 Am. Jur., Libel and Slander, Sec. 197, p. 185, of like effect; Newell, Libel and Slander, 4th Ed., p. 339. Manifestly, the case, on the merits, was properly submitted to the jury, and the requested peremptory instruction was properly refused.

On Objection to Dictionary Definition of Words

In the course of the appellant's cross-examination, he was asked to read a dictionary definition of "diabolic" and "plot". The objection was that the meaning in question was what the witness, not what someone else, understood it to be. The witness read from the book the definition of "diabolic" and confirmed also the meaning of "plot" therein, saying in each instance that those were definitions. He was asked if he wished to pick out others, but he declined to do so; nor did he offer his own accepted definition for those words.

This Court has recognized that, under the Anti-Dueling Statute, Sec. 1059, Code of 1942, Rec., the words there contemplated are "from their usual construction and common acceptation * * * considered as insults, and calculated to lead to a breach of the peace * * *". Huckabee v. Nash, 182 Miss. 754, 183 So. 500, and Salvo v. Edens, 237 Miss. 734, 116 So. 2d 220.

In cross-examination, a wide latitude is allowed. The examiner, in this instance, was trying to ascertain the appellant's understanding of the words. The appellant, however, advanced nothing to the contrary. There is no complaint that the court used a dictionary definition in the instructions to the jury. Of course that cannoot be done. Jarnigan v. Fleming, supra, so held.

It therefore follows that the objection to this examination was without merit.

THE MOTION TO QUASH THE JURY PANEL

The appellant, on this motion, placed on the stand three supervisors and the chancery clerk of the county in an effort to show discrimination, because of race, in selecting, drawing and empaneling jurors. But these witnesses, with one accord, testified that there had been no discrimination whatever in the selection, drawing and empaneling of jurors as regards the white and Negro races; that they selected "qualified persons of good intelligence, sound judgment, and fair character" in strict conformity with Sec. 1756, Code of 1942, Rec.; and that there were no marks to indicate in any way the color of the potential jurors. Besides, six Negroes, registered and qualified persons, used as witnesses by the appellant, testified that they had been called for jury service several times in past years, and that others of like color were on the jury panels at those times. One witness testified that he remembered that eight or ten Negroes were called on the panel at one term last year. The trial judge stated into the record that

he had been the presiding judge of that court since January 1943; that, to his knowledge, Negroes had not been systematically kept off of juries; and that the court had empaneled them on both grand and petit juries since he had been judge. He mentioned cases when Negroes actually sat on the panel in trials. He either drew the names of the jurors, or they were drawn by the statutory officers, when he did not perform this service, and that there was no instance of failing to select, or of excluding, Negroes because of their race. There had always been quite a number of such names in the boxes.

In other words, the evidence wholly failed to show any discrimination against Negroes in the selection and empaneling of jurors. And so, as it was said in Wilson v. State, 243 Miss. 859, 140 So. 2d 275, at page 867:

"Appellant, therefore, did not meet his burden. His witnesses proved that the converse of his motion was true." See also Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 692, and cases there cited. Cf. also Hernandez v. Texas, 347 U. S. 475, 74 S. Ct. 667, 98 L. Ed. 866; Kennard v. State, 242 Miss. 691, 128 So. 2d 572.

This Court in Cameron v. State, 233 Miss. 404, 102 So. 2d 355, observed that it was a matter of common knowledge that the supervisors, in most of the counties in the state, since the decision of the Supreme Court of the United States in the case of Patton v. Mississippi, 332 U. S. 463, 68 S. Ct. 184, 186, 92 L. Ed. 76, have been placing the names of qualified Negroes in the jury boxes. Cf. also Goldsby v. State, 240 Miss. 647, 123 So. 2d 429 (1960), cert. den., 365 U. S. 861, 81 S. Ct. 829, 5 L. Ed. 2d 824, where a change of venue was granted because of lack of names of Negroes in the jury boxes in the county where the crime was committed.

Manifestly the court correctly overruled the motion to quash the panel of jurors on account of the alleged discrimination against selection of Negroes for jury service.

OVERRULING MOTION FOR MISTRIAL ON ACCOUNT OF ARGUMENT TO JURY BY COUNSEL FOR APPELLEE

The appellant contends that the court committed reversible error in its refusal to grant him a mistrial because of alleged prejudicial argument by counsel for appellee in the closing address to the jury. The record discloses the statements and the actions thereon as follows:

"Sullivan: 'If they put that white boy out on the highway, how in the world did they know that Aaron Henry was going to come by? I don't know. How in the world did they know a Pontiac was going to come down that highway being driven by Aaron Henry? Yet Aaron Henry himself said 'I picked him up on the highway.'

"(Loud murmur in courtroom.)

"Semmes Luckett: Your Honor, I will ask that the courtroom be cleared.

"Court: Mr. Sheriff, I am not going to have that kind of thing going on in this courtroom. Is there a motion to clear the courtroom?

"Charles Sullivan: No, sir, not as long as it doesn't reoccur.

"Court: I want to announce that no person shall open their mouth again, regardless of who they are. This is the first time a thing like this has happened in the 23 years that I have been on the bench. Mr. Sheriff, stand out there and if a single person bats an eyelash I want them brought up here. Proceed with your argument, Mr. Sullivan.

(The record does not show that any objection whatever was made by counsel for appellant to the language which had been used or to what had occurred at that time.)

"Sullivan: 'Do you know what punitive damages are, and compensatory damages, for that matter? They are a by-product of our civilization. There was a period in man's history when if someone had said what Aaron Henry said about Ben Collins, there would have been a homicide that night—somebody would have gotten killed. There was a time in Mississippi when that would have happened. If Aaron Henry had accused this man of being a dirty crook, there was a time when there would have been a killing that night.

"Jack H. Young: We object, your Honor.

"Court: I sustain the objection.

"Charles L. Sullivan: I think that is a proper statement, your Honor.

"Jack H. Young: I would like to make a motion, your Honor, for a mistrial.

"Court: I overrule the motion for a mistrial, but let the record show that I am instructing the jury to disregard that statement. Continue with your argument."

The speaker then resumed his argument, and, from the context, it is clear that he was undertaking to explain the differences between punitive, and compensatory, damages. He asserted that punitive damages are a by-product of our civilization, saying that "There was a period in man's history when if someone had said what Aaron Henry said about Ben Collins, there would have been a homicide that night—somebody would have gotten killed. There was a time in Mississippi when that would have happened. If Aaron Henry had accused this man of being a dirty crook, there was a time when there would have been a killing that night." This reference was evidently to the pioneer days of the country when a man, who felt that his honor

had been questioned, arrogated to himself the right to be his own avenger. Dueling was commonly practiced, not only in this state, but in other parts of this country. A noteworthy instance is the well-known duel between Burr and Hamilton. In an effort to suppress this evil, the Legislature of the state enacted the so-called Dueling Statute, Sec. 1059, Code of 1942, Rec., making "All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace * * * actionable." Huckabee v. Nash, 182 Miss. 754, 183 So. 500; Salvo v. Edens, 237 Miss. 734, 116 So. 2d 220; as heretofore stated.

Since the first statement of counsel was not objected to at all during the trial and was first raised in appellant's brief in this Court, the objection is without merit. In Robertshaw Trustees v. Columbus & G. Ry. Co., 185 Miss. 717, 188 So. 308, it was said: "In order to put the trial court in error, it must be shown not only that there was error but that the error or errors were committed by the court after a fair and definitely presented opportunity was given to avoid or correct them." See also Stevenson v. Robinson, 37 So. 2d 568 (Miss.); Lyle v. Johnson, 240 Miss. 154, 126 So. 2d 266.

The basis of the rule against argumentative appeals to racial prejudice, in its full extent, is stated in Hampton v. State, 88 Miss. 257, 40 So. 545, as follows: "Mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing. All must be tried on facts, and not on abuse. Only impartial trials can pass the Red Sea of this court without drowning. Trials are to vindicate innocence or ascertain guilt, and are not to be vehicles for denunciation." And in Harris v. State, 96 Miss. 379, 50 So. 626, it was said: "Every defendant at the bar of his country, white or black, must be accorded a fair trial according to the law of the land, and that law knows no color." In the first instance, the sale of liquor was charged.

Objection to the prejudicial argument went unrebuked by the court, and exceptions were properly taken. In the second instance, the defendant, a Negro, was being tried on the charge of assault, with intent to murder a white man. Counsel protested and objected five times about the prejudicial remarks, but the same were ignored by the trial judge.

Insofar as his contention on the second statement is concerned, the appellant relies on seven cases from this jurisdiction, namely, Hardaway v. State, 99 Misc. 223, 54 So. 833; Moseley v. State, 112 Miss. 854, 73 So. 791; Garner v. State, 120 Misc. 744, 83 So. 83; Walton v. State, 147 Miss. 17, 112 So. 601; Roby v. State, 147 Miss. 575, 113 So. 185; Harris v. State, 209 Miss. 141, 46 So. 2d 91; Reed v. State, 99 So. 2d 455 (Miss.).

A study of these cases shows that, in every instance, except one, the defendants were Negroes and the State witnesses were Whites. In the Garner case, supra, although the victim of the rape was a young Negro girl, the exhortation to the jury by the prosecuting attorney was that they should not turn loose a brute of the defendant's race on the community.

Besides, in each instance there was an express appeal to racial prejudice, and the veracity of the witnesses, both Negroes and Whites, was expressly pitted against each other. In each case there were objections to the pungent arguments and appeals to prejudice by the prosecuting attorneys. In every case the trial judges either overruled the objections or declined or failed to rule on them at all. They did not disapprove or condemn such arguments nor did they admonish or direct the juries to disregard the same. Thus the judges did not, in any way, seek to effect the erasure of such prejudicial matters from the minds of the jurors.

Manifestly the cases, which the appellant has cited, are not indicative of what the court should hold in the present case. In this case, when the objection was made, the trial judge promptly sustained it. When counsel then

moved for a mistrial, the court overruled it but directed that the record should show that "I am instructing the jury to disregard" the speaker's statement. In the absence of the exact words which the judge used for that purpose, it must be assumed that they fully covered the matter.

This Court has recognized that, when an objection is made to arguments and the same is sustained by the court, usually the ill effect of the statement, if any, is corrected. In the case of Herrin v. State, 201 Miss. 595, 29 So. 2d 452, a manslaughter case, the district attorney, in his closing remarks to the jury, said: " 'Gentlemen of the jury you can acquit the defendant on this charge and let him go free, and if you do he may kill another person, and the next time it may not be a colored person,' to which the defendant 'duly objected, and which objection the court duly sustained.' " The court, in dealing with this objection, said that "we are of the opinion that while the remarks of the district attorney constituted an appeal to race prejudice, and should not have been made, the action of the trial court in promptly sustaining an objection thereto was sufficient to prevent his overruling of the motion for a mistrial from constituting a reversible error, under all the facts and circumstances of this case." See also Pitts v. State, 211 Miss. 268, 51 So. 2d 448, an appeal from a life sentence; Thomas v. State, 200 Miss. 220, 26 So. 2d 469, a manslaughter case; Moon v. State, 176 Miss. 72, 168 So. 476, a death sentence; Bufkin v. State, 134 Miss. 116, 98 So. 455; Cavanah v. The State, 56 Miss. 299.

In the Pitts case, supra, dealing with the five statements in the bill of exceptions as improper but not sufficient to cause a reversal, the Court said: "After each of the statements, the court sustained objections to it. The cumulative effect on a jury of the trial judge's sustaining a defendant's objection to argument and after admonishing the state's attorney to stay within the evidence usually has the effect of curing the improper conduct and prejudicing the state's rather than the defendant's case." In the

Thomas case, supra, in overruling the claim of prejudice from the alleged injection of the racial issue into the case, the Court said: "The record shows that when the irregularities occurred the court not only sustained the objections made to them, but in each case the court expressly admonished the jury to disregard the matter of which the complaints were made; and this direct admonition to the jury by the court was sufficient to cure the improper conduct."

All of the cases show that the evil inveighed against in prejudicial argument of this kind is the appeal to racial prejudice and the arrayal of White against Negro.

The statement here under review cannot be held either to intend, or to produce, that result. In the explanation of punitive damages, counsel was merely saying that people in this state and country do not settle alleged reflections on their honor as they did in the old days. On the contrary the law recognizes the existence of injuries on that account, and provides for retribution in a lawful way by the award of damages without resort to six-guns or violence. Such was the purpose of the Anti-Dueling Statute. Whether this fact of history is known to the great masses of the people or not, at least the change in the method of settling such affairs is now known because the original practice has been greatly mitigated. Jurors in the county where this trial occurred are required to be men "of good intelligence, sound judgment and fair character."

There would be no difference between saying "if the defendant had done this to the plaintiff" and in saying "if Aaron Henry had done this act to Ben Collins." There simply was no appeal to racial prejudice.

The trial judge, out of an abundance of caution, sustained the objection and instructed the jury to disregard the statement of counsel. If it could, by the wildest stretch of the imagination, be said that any harm had resulted, manifestly such harm must have been eradicated from the minds of the jurors.

There is this added fact in connection with this assignment: The appellant made no claim in his motion for a new trial that he should be awarded this relief because of error in the refusal to grant a mistrial based on prejudicial argument to the jury by counsel for appellee.

The trial court had no opportunity whatever to review, following the completed trial, his action in that particular matter. This Court has repeatedly held that, unless the point is preserved in the motion for a new trial, the contention that the verdict is contrary to the great weight of the evidence cannot be reviewed here. Youngblood v. State, 216 Miss. 202, 62 So. 2d 218, and authorities there cited. Prejudicial evidence and prejudicial arguments are so closely akin that they should be treated in the same manner. There is no reason why the same rule should not be applicable to both. If one is to profit from the failure of the court to overrule a motion for a mistrial because of prejudicial argument, such point should be preserved by including it in the motion for a new trial. Inasmuch as it had not been heard of until its assignment in this Court, it must therefore be viewed as an afterthought. Consequently there was no error on the part of the court in this respect.

The Refusal of the Court to Permit the Filing of a Plea of Qualified Privilege

After the appellee had rested his case, the appellant asked leave to amend his answer and set forth the defense of qualified privilege, based on fair comment. This motion was denied on the ground that it had been filed too late. Be that as it may, however, the measurable privilege of publications, dealing with public officials, requires that such publications must be within the bounds of fair comment and must not be motivated by actual malice.

In the case of Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693, at p. 576 of the State Report, 76 So. 2d 699, this

Court cited and quoted from 33 Am. Jur., Libel and Slander, Sec. 169, pp. 161-164, as follows: "Although there are a few decisions to the contrary, the great weight of authority supports the view that publications dealing with political matters, public officers, and candidates for office are entitled to a measurable privilege by reason of the public interest involved therein. The principal limitations upon the rule are that the statements must be within the bounds of fair comment and must not be motivated by actual malice * * *. The rule does not, however, place such persons wholly without the protection of the law, and although there is authority to the contrary, it is generally held that accusations of crime, dishonesty, fraud, corruption, immorality, etc., and imputations of dereliction of duty, favoritism, or misconduct in office, are not privileged." See also Edmonds v. Delta Democrat Publishing Company, 230 Miss. 583, 93 So. 2d 171; Scott-Burr Stores Corporation v. Edgar, 181 Miss. 486, 177 So. 766; Kroger Grocery & Baking Company v. Harpole, supra; Louisiana Oil Corporation v. Tenno, 173 Miss. 609, 157 So. 705; Hodges v. Cunningham, 160 Miss. 577, 135 So. 215; Hines v. Shumaker, supra. Likewise, the Law of Torts, Harper and James, p. 457, is to the effect that proof of actual malice defeats the qualified immunity of fair comment.

The statements in this case accused the appellee of being guilty of crimes. There was no evidence to sustain such a charge. The appellant, who was called by the appellee as an adverse witness in the presentation of his case, had, in no way, offered any suggestion of a qualified privilege under the theory of fair comment. Consequently, such a defense would have been without avail. The appellant therefore could have suffered no injury whatever from the denial of his motion in this particular.

THE RESTRICTION OF LIBEL INFRINGES THE FREEDOM OF SPEECH

This contention is utterly untenable. The authorities are legion as to the right to call a person, guilty of malicious libel, into account for his defamation. The Supreme Court of the United States in Konigsberg v. State Bar of California, 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105, said that the First Amendment is not an absolute. See also Near v. Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357.

THE AMOUNT OF THE VERDICT

The appellant contends that the verdict in this case is grossly excessive and evinces passion and prejudice. Under the law, damage is presumed to result from a malicious libel and, of course, it followed from the publication of this malicious libel. Reckless negligence in the infliction of a personal injury would afford a remedy to the victim. As was said in Jarnigan v. Fleming, supra, "Character is far more sacred than property, and should be protected by courts and juries with watchful care. Persons who injure the character of others, ought to be no less answerable to justice than those who injure property."

When the words are prompted by malice, punitive or exemplary damages may be awarded. Kroger Gro. & Bk. Company v. Harpole, supra; Interstate Company v. Garnett, 154 Misc. 325, 122 So. 373; Gardner v. Martin, 123 Misc. 218, 85 So. 182; 53 C. J. S., Libel and Slander, Sec. 260 b., p. 373. In the Garnett case, supra, this Court let $15,000 of a verdict of $25,000 stand, although in that case it was necessary for the jury to determine, because of the susceptibility of two potential meanings of the words, whether or not the particular words were slanderous. Too, that case was decided in 1929 when dollars had greater purchasing value. In that case, there was proof as to the financial worth of the appellant, whereas there

is no evidence on that phase of the case in the present record. But this Court cannot be blamed for lack of that information.

When published statements are considered and reduced to writing, there is study and concentration on the subject matter. This clearly establishes deliberate intent, evincing malice if the same is false. On the contrary, a sudden loss of temper may be the reason for the utterance of a defamatory statement. For that reason, it may be that a jury would be impelled to award a larger verdict for injuries flowing from libel than from slander.

According to the evidence, the appellee was thirty-two years of age, married and the father of one child. He was a dedicated officer, having been engaged in the important occupation of law enforcement since 1956. He was striving to make a successful life career in that phase of human endeavor. His salary at the time was $600 per month. He had noted ill effects and symbols as a result of the defamation, and these were not restricted to the local area.

The Court is unaware of any rule whereby it can justly reduce the amount of this verdict which was solemnly adjudged by the jury. That being true, the Court is not in position to say that the verdict is grossly excessive or that it evinces passion or prejudice on the part of the jury.

The Court finds no reversible error in the case and the judgment of the trial court must therefore be affirmed.

AFFIRMED.

KYLE, MCELROY, RODGERS and JONES, *JJ.*, concur.

Appendix C

COPY OF ARTICLE WHICH APPEARED IN THE CLARKSDALE PRESS REGISTER, WEDNESDAY AFTERNOON, MARCH 7, 1962, AT PAGE 12:

FBI Investigation Asked
NAACP PRESIDENT RAPS 'PLOT' BY OFFICERS

Aaron Henry, state president of the National Association for the Advancement of Colored People, said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Clarksdale Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

Henry called the arrest "a diabolical plot cooked up" by the Coahoma County prosecutor, Thomas H. Pearson, and Collins.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Mississippi.

He said it was "legally inconceivable that he could be charged with any crime taking place outside the city limits of Clarksdale" last Saturday and that he had "unimpeachable witnesses to prove his whereabouts at all times."

Henry's complaint questioned his arrest by city officers, and he said that Coahoma Sheriff L. A. Ross "could never have been persuaded to go along with such a plot."

COPY OF ARTICLE WHICH APPEARED IN THE GULFPORT DAILY HERALD ON MARCH 7, 1962, AT PAGE 15:

CLAIMS CIVIL RIGHTS VIOLATED

Clarksdale, Miss. (AP) Aaron Henry, state president of the National Association for the Advancement of Colored People, says he has complained to the Justice Department that his civil rights were violated when officers arrested him here.

Henry was arrested Saturday night on charges of disturbing the peace. Bolivar County Atty. Frank Wynne said the charges stemmed from "obscene advances on a male person."

Henry, 39-year-old Negro, said Tuesday night he filed his complaint with the Justice Department.

He said the arrest was an attempt to discredit him, the NAACP and the "Negro freedom movement in Clarksdale and Coahoma County."

Henry charged the arrest was "a diabolical plot cooked up" by Coahoma County Atty. T. H. Pearson and Clarksdale police chief Ben Collins.

An 18-year-old white hitchhiker from Memphis claimed that Henry gave him a ride and made unnatural advances in the car.

COPY OF ARTICLE WHICH APPEARED IN THE MERIDIAN STAR ON MARCH 7, 1962, AT PAGE 2:

NAACP PRESIDENT
ARRESTED IN DELTA
ON MORALS CHARGE

Clarksdale, Miss. (UPI)—Aaron Henry, state president of the National Association for the Advancement of Colored People, said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Miss.

COPY OF ARTICLE WHICH APPEARED IN THE DAILY CORINTHIAN ON MARCH 7, 1962, AT PAGE 4:

NAACP LEADER ASKS FBI PROBE OF HIS ARREST

Clarksdale, Miss. (UPI)—Aaron Henry, state president of the National Association for the Advancement of Colored People, said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

Henry called the arrest "a diabolical plot cooked up" by the Coahoma County prosecutor, Thomas H. Pearson, and Collins.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Miss.

He said it was "legally inconceivable that he could be charged with any crime taking place outside the city limits of Clarksdale" last Saturday and that he had "unimpeachable witnesses to prove his whereabout at all times."

Henry's complaint questioned his arrest by city officers rather than county sheriff's officers, and he said that Coahoma Sheriff L. A. Ross "could never have been persuaded to go along with such a plot."

COPY OF ARTICLE WHICH APPEARED IN THE DELTA DEMOCRAT-TIMES ON MARCH 7, 1962, AT PAGE 2:

NAACP BOSS ASKS FBI TO PROBE ARREST

Clarksdale, Miss. (UPI)—Aaron Henry, state president of the National Association for the Advancement of Colored People said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

• • •

Henry called the arrest "a diabolical plot cooked up" by the Coahoma County prosecutor, Thomas H. Pearson, and Collins.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Miss.

He said that it was "legally inconceivable that he could be charged with any crime taking place outside of the city limits of Clarksdale" last Saturday and that he had "unimpeachable witnesses to prove his whereabouts at all times."

Henry's complaint questioned his arrest by city officers rather than county sheriff's officers, and he said that Coahoma Sheriff L. A. Ross "could never have been persuaded to go along with such a plot."

COPY OF ARTICLE WHICH APPEARED IN THE VICKSBURG EVENING POST ON MARCH 7, 1962, AT PAGE 3:

COMPLAINT FILED

Clarksdale, Miss. (AP)—Aaron Henry, state president of the National Association for the Advancement of Colored People, says he has complained to the Justice Department that his civil rights were violated when officers arrested him here.

Henry was arrested Saturday night on charges of disturbing the peace. Bolivar County Atty. Frank Wynne said the charges stemmed from "obscene advances on a male person."

Henry, 39-year-old Negro, said Tuesday night he filed his complaint with the Justice Department.

He said the arrest was an attempt to discredit him, the NAACP and the "Negro freedom movement in Clarksdale and Coahoma County."

Henry charged the arrest was "a diabolical plot cooked up" by Coahoma County Atty. T. H. Pearson and Clarksdale police chief Ben Collins.

An 18-year-old white hitchhiker from Memphis claimed that Henry gave him a ride and made unnatural advances in the car.

UNITED PRESS INTERNATIONAL

Aaron Henry, state president of the National Association for the Advancement of Colored People, said Tuesday night he had asked the FBI to investigate his arrest Saturday on a morals charge.

Henry issued a statement saying he had filed a formal complaint with the Justice Department charging his civil rights had been violated by officers from nearby Bolivar County and Clarksdale.

He was arrested Saturday night by Clarksdale Police Chief Ben Collins on a Bolivar County warrant charging him with disturbing the peace by allegedly making immoral advances to an 18-year-old white youth.

Henry called the arrest "a diabolical plot cooked up" by the Coahoma County prosecutor, Thomas H. Pearson, and Collins.

The warrant charges that the incident occurred Saturday when he allegedly picked up the white youth hitchhiking from Memphis to Cleveland, Mississippi.

He said it was "legally inconceivable that he could be charged with any crime taking place outside the city limits of Clarksdale" last Saturday and that he had "unimpeachable witnesses to prove his whereabouts at all times."

Henry's complaint questioned his arrest by city officers, and he said that Coahoma Sheriff L. A. Ross "could never have been persuaded to go along with such a plot."

ASSOCIATED PRESS

Clarksdale, Miss., March 6—(AP)—Aaron Henry, 39-year-old State President of the National Association for the Advancement of Colored People, said Tuesday night he had filed a complaint with the Justice Department charging violation of his civil rights.

Henry claimed the violation came in his arrest on charges of disturbing the peace. Bolivar County Atty. Frank Wynne had said the charges grew out of "obscene advances on a male person."

The arrest, Henry said, was an attempt to discredit him, the NAACP and the "Negro freedom movement in Clarksdale and Coahoma County."

He charged the arrest was "a diabolical plot cooked up" by Coahoma County Atty. T. H. Pearson and Clarksdale Police Chief Ben Collins. Henry added that Sheriff L. A. Ross of Coahoma County must "have been bypassed in the plot. The sheriff does not agree with out movement but also won't sell himself to do such a thing."

"It is my opinion," Henry said, "Whatever the charge is—it has been concocted between certain city and county officials. It is not going to slow our work down."

He has led a campaign to get merchants to stop referring to Negroes as "nigger" and "boy" and to get Negroes jobs above menial labor.

Henry said officials weren't specific as to when the act occurred, but said they asked him where he was between 5 and 6 P.M. Saturday.

Henry said he had his car washed between 10 A.M. and 5:20 P.M. Saturday and never left Clarksdale. He was supposed to have picked up an 18-year-old white hitchhiker from Memphis in Mound Bayou and made unnatural advances.

Henry was arrested Saturday night in Clarksdale and later released on $1,000.00 bond. He said the bond he signed did not have the charge written down.

He also questioned the authority and validity of the charge because Coahoma County Atty. T. H. Pearson told him Bolivar County authorities reported the offense to city authorities rather than County.

"It's unusual," he said, "that the Bolivar County Sheriff came to the city hall here to report the charge instead of to the Coahoma County Sheriff."

Henry said his attorney, R. Jess Brown of Jackson, had not been advised when a trial would be held.

Appendix D

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Twenty West Fortieth Street
New York 18, N. Y.

LOngacre 3-6890

Please direct reply to:

Mr. Medgar W. Evers
1027 Lynch Street, Room 7
Jackson 3, Mississippi

FLeetwood 3-6906

March 6, 1962

Mr. Norwood
Deputy Sheriff
Bolivar County
Cleveland, Miss.

Dear Mr. Norwood:

First I want to thank you for the fair manner in which I was treated while in your coustdy as a prisoner on Saturday Night March 3rd, 1962. Except for our discussion concerning the hand cuffs and the body chain there was no other difficulties of which I am appreciative.

You will probably see in print where I have filed a complaint with the Justice Department charging a denial of Civil Rights in the arrest itself. The complaint states that in my opinion the charge under which I was arrested was born in the minds of the County Attorney and the Chief of Police of my town due to my activity in the area of Desegregation, Registering and Voting and politics as I serve on the committed of the Trammell to Congress Committee, sponsorning a Negro for Congress. Also these two men are against me due to my activity in suggesting

to Negroes that we all trade in those stores thay employ us and hire us above the menial level.

What I want to be clearly understood that I am not charging nor am I of the opinion that you nor any other authority of Bolivar County is a party to this diabolical plot. I do think that the two men above mentioned has schemed with some person to make the charge in Bolivar County and unknowingly Bolivar County is being used to some extent as a party in the Racial difficulties of Coahoma County. I believe that Coahoma County should contain its own racial strife and not schemingly get other counties involved in our own difficulties.

Incidentally when I recieved my personals from the jail at Cleveland my address books was missing. I would like to know if you can tell me what procedure I can or should use to get it back as there are some persons in the book I would like to keep in touch with.

Again I say a personal thanks to you.

A fellow Mississippi Citizen,

Aaron E. Henry

AARON E. HENRY, President, Miss. State Conference NAACP

213 4th Street

Clarksdale, Miss.

Aaron E. Henry, President
Miss. State NAACP
213 Fourth Street
Clarksdale, Miss.

(stamp)

Mr. Norwood
Chief Deputy Sheriff
Bolivar County
Cleveland, Miss.

Office-Supreme Court, U.S.
FILED
JAN 30 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 89

AARON E. HENRY,
Petitioner,

vs.

BENFORD C. COLLINS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MISSISSIPPI

SEMMES LUCKETT
Clarksdale, Mississippi
LEON PORTER
Clarksdale, Mississippi
C. L. SULLIVAN
Clarksdale, Mississippi
W. O. LUCKETT
Clarksdale, Mississippi
Attorneys for Respondent

E. L. MERIDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 89

AARON E. HENRY,
Petitioner,

vs.

BENFORD C. COLLINS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MISSISSIPPI

We respectfully submit that the petition should be denied because—

1) The rights, privileges or immunities under the Constitution of the United States which petitioner seeks to have reviewed, with the exception of his claim that Negroes were systematically excluded from the jury panel, were not specially set up or claimed in the state courts.

2) If the right, privilege or immunity not to be subjected to a libel action except under rules which accord with the holding of this court in *New York Times* v. *Sullivan,* 11 L. Ed. 686, was specially set up or claimed in the state court, petitioner was not denied such right, privilege or immunity because (a) Mississippi's rules of law accord with the holding in Times

v. Sullivan, and (b) this action was determined in the state courts as required by rules approved in Times v. Sullivan.

3) Negroes were not systematically excluded from the jury panel.

STATEMENT OF THE CASE

This is a libel action which was brought by respondent against petitioner in the Circuit Court of Coahoma County, Mississippi, on April 25, 1962. In his declaration respondent charged that petitioner, on the 6th day of March, 1962, maliciously prepared, composed and published a libelous letter to Mr. Norwood, Deputy Sheriff of Bolivar County, Mississippi, which contained a malicious libel concerning respondent in his official capacity as Chief of Police of Clarksdale, Coahoma County, Mississippi, and which was thereafter read by the addressee and divers other persons, and that petitioner, also on the 6th day of March, 1962, maliciously prepared, composed and published false, defamatory and libelous statements concerning respondent in his official capacity as Chief of the Police Department of Clarksdale, Coahoma County, Mississippi, by deliberately communicating the same to the United Press International News Bureau, at Jackson, Mississippi, and the Associated Press at Jackson, Mississippi, with the express intent and for the sole purpose that the same be published, republished, communicated and circulated by such news agencies to their subscribers.

Respondent further charged in his declaration that the false, defamatory and libelous statements communicated to such news agencies were communicated and circulated by such news agencies to their subscribers on March 6 and 7, 1962, and actually published in a number of Mississippi

newspapers on March 7, 1962, including the one published in respondent's and petitioner's home town of Clarksdale, Mississippi.

Petitioner, on July 2, 1962, filed his answer to the declaration. In it, he admitted writing the letter to Mr. Norwood but denied that it was false, defamatory or libelous, or maliciously prepared. He denied all averments touching the statements to the news agencies.

Petitioner's answer contained no plea of privilege or fair comment.

With the pleadings as thus described, the action came on for trial on July 19, 1962. Respondent thereupon introduced evidence to the following effect:

On the afternoon of March 3, 1962, a warrant was issued by a Justice of the Peace in Shelby, Bolivar County, Mississippi, for the arrest of petitioner on a disorderly conduct charge (R. 49). It was sent to Clarksdale, Coahoma County, Mississippi, where petitioner resides, for execution (R. 49).

Petitioner was arrested later that afternoon by respondent, pursuant to the directions of the warrant, and taken to the Clarksdale City Jail (R. 118). The Bolivar County authorities were notified of the arrest and requested to send for the prisoner (R. 127).

In the meantime, W. S. Kincade, Mayor of Clarksdale (R. 77), had learned of the calls from Shelby to Clarksdale about the incident and had left word at the police station for respondent to telephone him when he came in (R. 78). Respondent did so (R. 119), and advised Mr. Kincade of petitioner's arrest (R. 78, 119). Mr. Kincade thereupon determined to go to the police station to find out what it was all about (R. 78, 79, 119).

By the time Mr. Kincade arrived at the police station, Eilert, the complaining witness, was there, and so Kincade promptly took Eilert into respondent's office, questioned him, and then directed the respondent to call T. H. Pearson, the County Prosecuting Attorney, to the City Jail for the purpose of interrogating Eilert (R. 79, 90). From the information then available to the Clarksdale Police Department no one knew if such alleged offense had been committed in Bolivar County, or if any had been committed, and it was only determined that such alleged offense had been committed in Bolivar, if any offense had been committed, after the County Prosecuting Attorney completed his interrogation of the principal parties involved (R. 120, 121, 75, 65). (A look at a map will show that Clarksdale and Shelby are but approximately twenty miles apart and that the dividing line between Coahoma County and Bolivar County is nearly equidistant from both towns.)

When Pearson arrived at the city jail, present were respondent, the Chief of Police; Mr. Kincade, the Mayor; Mr. Manuel Nassar, Deputy Marshal of Shelby, Mississippi, and Deputy Sheriff of Bolivar County; another law enforcement officer from Bolivar County not known to Pearson; and Sterling Eilert (R. 65), and Pearson began his investigation by talking with Eilert. After hearing what Eilert had to say, Pearson decided that whatever statements he took should be recorded on his tape recorder, and accordingly he went to his office and obtained his tape recorder (R. 65). He then took statements from Eilert, Clifford Smith, an employee of petitioner, Noelle Henry, the wife of petitioner, and petitioner himself (R. 65, 66). All were recorded on tape (R. 65, 66).

After talking to those above listed, Pearson came to the conclusion that such criminal offense as had been committed, if any had been committed, had not been committed

in Coahoma County (R. 75, 120), and so closed his interview and left the city jail (R. 66). Petitioner was then delivered to the Bolivar County officials (R. 121) and he remained in custody in the Bolivar County Jail until his release the following day (R. 140, 141).

On March 6, two days after his release, petitioner wrote the letter to Mr. Norwood in which he stated that he had filed a complaint with the Department of Justice charging that "the charge under which I was arrested was born in the minds of the County Attorney and the Chief of Police" of Clarksdale, and in which he charged that his arrest was the result of a "diabolical plot" between Pearson and respondent (R. 37, 40). The envelope in which it was mailed shows that it was mailed from Clarksdale on March 7, 1962, at 4:00 P.M. (R. 41).

Also on March 6, petitioner had two telephone conversations with Van H. Savell, of the Associated Press, who had called petitioner to discuss the details of an earlier story about his arrest (R. 84, 85). Petitioner had been out at the time but later returned the call (R. 85). In that conversation petitioner told Savell that he was going to file a complaint with the Department of Justice (R. 85). Around 8:00 o'clock of that evening, petitioner called Savell to tell him he had filed his complaint with the Department of Justice and that he wanted to read it to him (R. 85, 86). He did so twice while Savell was taking notes as to its contents, and then the two had a further discussion (R. 86). Afterwards, Savell devised a message from his notes and wired it to New Orleans where it was rewritten into the story which appeared in the Vicksburg and the Biloxi-Gulfport newspapers (R. 86). In it, petitioner charged that his arrest "was an attempt to discredit him" and "a diabolical plot cooked up" by Pearson and respondent.

Also on March 6, petitioner called the Jackson office of United Press International (R. 90). He wanted to talk to Mr. Herbers, manager of the office, but Herbers was out (R. 90, 91), and so he talked to Mr. Lloyd B. Jeffers, who works under Herbers (R. 90, 91). In their conversation petitioner told Jeffers that he had filed a complaint with the Department of Justice about his arrest and that he had a statement for release (R. 91), and then read the statement to Jeffers (R. 92). Jeffers took it down as he dictated it (R. 92) and then wrote and sent out the story which was published in the Clarksdale, Greenville, Corinth and Meridian newspapers (R. 94, 95). It included a statement which petitioner had made over the telephone to Jeffers that his arrest had resulted from "a diabolical plot cooked up" by Pearson and respondent (R. 95, 96).

The Clarksdale newspaper in which petitioner's statements appeared (R. 102, 103) has a circulation of about 6,000 (R. 104), concentrated mainly in the counties of Coahoma, Quitman, Tunica and Bolivar (R. 104).

Petitioner knew when he called the Associated Press and United Press International that both were engaged in the business of gathering and disseminating news stories (R. 42). In fact, United Press International had carried stories originating with petitioner prior to March 6, 1962 (R. 90). The charge that his arrest was "a diabolical plot cooked up" by the County Prosecuting Attorney of Coahoma County (Thomas H. Pearson) and the Clarksdale Chief of Police (Respondent) was appellant's own words (R. 87, 95, 96). They were quoted from the statement read by petitioner over the telephone (R. 87, 95).

Respondent is a permanent resident of Clarksdale, was thirty-two years of age at the time of the trial, is married, and has one child, a six year old daughter (R. 121). He

has been in law-enforcement work continuously since 1956, and during said period of time has served in the capacity of Deputy Sheriff of Coahoma County, a member of the Mississippi State Highway Patrol, and is presently the Chief of the Clarksdale Police Department (R. 122); it is his sincere desire and intention to make law enforcement his professional career (R. 122, 123).

Respondent's charges are false. No one has framed him. No one has "cooked up" any plot, diabolical or otherwise, to have him arrested on a morals charge (R. 66, 119). Pearson had never seen Eilert prior to the time he came to the city jail to question petitioner (R. 64). Respondent knew nothing about the events in Shelby until the message came over the radio that a warrant had been issued there for his arrest (R. 116, 117). In fact, respondent knew only that petitioner was charged with disorderly conduct when he arrested him (R. 118). The first contact which respondent had with Pearson about the matter was when he called Pearson to come to the city jail pursuant to the directions of Mr. Kincade (R. 119, 120). The first Pearson knew of the affair was gathered from the call to come to the city jail (R. 64, 65). Neither had discussed the matter with the other prior to that time (R. 64, 119).

At the conclusion of respondent's proof, petitioner moved the court for a directed verdict on the grounds, among others:

> That to render a verdict for (respondent) on the testimony and evidence would deny (petitioner) the right of free speech, as guaranteed by the First Amendment of the Constitution of the United States; and
>
> That to render a verdict for (respondent) on the testimony and evidence would deprive (petitioner) of his property contrary to the due process clause of

the Fourteenth Amendment of the Constitution of the United States.

The motion was denied.

Petitioner therefore moved the court for permission to amend his answer in order that these might be incorporated therein. The motion was denied, with the court observing "that the plaintiff has now completed his case and has rested his case".

Petitioner thereupon introduced his evidence. It included his own testimony, on direct examination, that he believed that respondent had mistreated him (R. 143) and that he made the statement for the purpose of "criticizing" the County Prosecuting Attorney and respondent (R. 142).

Although petitioner admitted that he hasn't a shred of evidence that respondent had something to do with his arrest, he maintained from the witness chair that respondent had tried to frame him (R. 148).

The jury found for respondent and fixed his damages at $15,000.00 (R. 174).

Petitioner made a motion in chambers to quash the jury on the alleged ground that Negroes have been systematically excluded from jury service in Coahoma County. Testimony thereon was taken after the conclusion of the trial. Petitioner introduced three members of the five member Board of Supervisors and questioned them on their procedure in making up the jury list for the County. They were Mr. Young, Mr. Wilson, and Mr. Hughes. Each stated, without equivocation, that race did not enter into his consideration when he participated in making up the list (R. 180) (R. 183, 191, 194). In part, Mr. Wilson, whose beat has a small number of qualified electors, testified that he

simply put on the jury list every qualified elector in his district who was without legal or physical disqualification, regardless of his race. Mr. Logan, the Chancery Clerk, testified that the juries were drawn from the box in his presence and that no name was ever returned to the box after it was drawn because it happened to be the name of a Negro (R. 188). Not one scintilla of proof to the contrary was introduced by petitioner.

The motion was denied (R. 221).

Petitioner thereafter moved the court for a new trial on the grounds that the court had erred in refusing to quash the jury panel, that the verdict of the jury deprived him of his right of free speech as secured by the First Amendment to the Constitution of the United States, and that the amount thereof was so grossly excessive as to deprive him of his property contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 219). The motion was overruled (R. 219, 221).

Petitioner prosecuted an appeal to the Supreme Court of Mississippi from the judgment entered in response to the finding of the jury and in his assignment of errors charged that the trial court erred in overruling his objection to the reading to the jury the dictionary definitions of certain words which appeared in the libel, in overruling his motion for a directed verdict made at the close of respondent's case, in overruling his motion to amend his answer so as to allege the defense of qualified privilege by reason of "fair comment", in overruling his motion for a new trial.

The appeal was set for hearing before the Supreme Court of Mississippi on Monday, October 7, 1963, and was argued before the court on that day.

On December 2, 1963, the judgment of the trial court was affirmed by the Supreme Court of Mississippi. Its opinion appears in 158 So.2d 28.

Petitioner filed a Suggestion of Error with the Supreme Court of Mississippi wherein he suggested, among other things, that the court had erred in its decision of December 2, 1963, by refusing to reduce the size of the verdict, because "actions under the guise of libel which encroach upon freedom of speech and impair rights guaranteed by the Fourteenth Amendment of the United States Constitution must be nullified by an appellate court", and because of its failure to hold that the limitation of prospective jurors to qualified electors is discriminatory and violates the Fourteenth Amendment to the Constitution of the United States.

It was overruled.

NONE OF THE RIGHTS, PRIVILEGES OR IMMUNITIES DEPENDED UPON FOR SUPPORT WERE SPECIALLY SET UP OR CLAIMED EXCEPT PETITIONER'S CLAIM THAT NEGROES WERE SYSTEMATICALLY EXCLUDED FROM THE JURY PANEL.

Jurisdiction to review the judgment of the Supreme Court of Mississippi in this case exists only with respect to a right, privilege or immunity specially set up or claimed by petitioners under the Constitution of the United States. *28 U.S.C., #1257 (3).*

Six reasons have been advanced by petitioner for the issuance of the writ prayed for. Each fails because of the specific provisions of the statute.

Petitioner's first claim is that the judgment is in conflict with the principles enunciated in *New York Times* v. *Sullivan*, 11 L. Ed. 686, wherein this court stated that:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

which means, as we understand the opinion, that in a libel suit brought by a public official because of a statement defaming him with respect to his official conduct, the defense of qualified privilege is available to defendant, and in such a case it is encumbent upon the plaintiff, if defendant interposes the defense of qualified privilege, to prove (a) that the statement was false and (b) that it was published with knowledge of its falsity or with reckless disregard of whether it was false or not.

But petitioner did not claim qualified privilege under the Constitution of the United States. The right, privilege or immunity set up or claimed by him under the Constitution of the United States (done at an improper time and in an improper manner) was that of absolute privilege. His claim was that of absolute immunity from suit by a public official for defamation relating to his official conduct, regardless of the falsity of the defamatory statement and regardless of whether it had been published with "actual malice."

The next reason advanced by petitioner for the issuance of the writ consists of an argument that petitioner's statements were not libelous because petitioner is a Negro engaged in civil rights activities. But the Constitution of the United States does not extend a right, privilege or immunity from libel laws to Negroes engaged in civil rights activities and no such claim was ever specially set up in the state courts.

Petitioner's third reason for the issuance of the writ is essentially a claim of immunity from suit for libel in the state courts of Mississippi. We restrict our response to such claim by pointing to the fact that no such immunity can be found in the Constitution of the United States and that no such claim was ever specially set up in the state courts.

The fourth reason advanced by petitioner for the issuance of the writ consists of a claim that Negroes were systematically excluded from the jury panel. There is no proof to substantiate such a claim.

The next reason advanced for the issuance of the writ is embodied in an assertion that the cumulative effect of the trial court's rulings was to deny petitioner due process and equal protection of the laws. No such claim was ever specially set up in the state courts.

The last reason advanced by petitioner for the issuance of the writ resolves itself into a claim that this is not a private libel action but a state device to suppress criticism of public officials. No such claim was ever specially set up in the state courts and there is not a scintilla of evidence which can be cited in support of such a contention.

MISSISSIPPI'S RULES OF LAW ACCORD WITH HOLDING IN TIMES V. SULLIVAN

The main thrust of petitioner's argument is that the rules which govern actions of libel in Mississippi conflict with the holding of this court in *New York Times* v. *Sullivan*, 11 L. Ed. 2d 686. But petitioner is wrong in his contention. The state's rules are the same as those enunciated by this court in that case.

In Mississippi, criticism of a public or quasi-public official which relate to his public actions, even though they be libelous *per se*, are qualifiedly or conditionally privileged. *Krebs* v. *McNeal*, 222 Miss. 560, 76 So.2d 693, *Edmonds* v. *Delta Democrat Publishing Co.*, 230 Miss. 583, 93 So.2d 171.

In Mississippi, when the defendant in a libel action is entitled to the defense of qualified privilege, *e. g.*, when a public official sues someone for libel on account of libelous statements made about his official conduct,

> The plaintiff has no cause of action if the statements were made in good faith and without malice;
>
> The truth or falsity of the statements is not involved so long as there is no bad faith or malice;
>
> Malice will not be inferred even though the statements are libelous per se;
>
> It will be presumed that the statements were made in good faith;
>
> Malice and bad faith must be proved by plaintiff;
>
> The falsity of the statements must be proved by plaintiff.

See *Railway Co.* v. *Brooks*, 69 Miss. 168, 13 So. 847; *Louisiana Oil Corporation* v. *Renno*, 173 Miss. 609, 157 So. 705; *Kroger Grocery & Baking Co.* v. *Harpole*, 175 Miss. 227, 166 So. 335; *Scott-Burr Stores Corporation* v. *Edgar*, 181 Miss. 486, 177 So. 766; *Reliance Mfg. Co.* v. *Graham*, 181 Miss. 549, 179 So. 341; *Tibbs Tool Co.* v. *Hobfield*, 218 Miss. 670, 67 So.2d 609; *Krebs* v. *McNeal*, 222 Miss. 560, 76 So.2d 693; *Killebrew* v. *Jackson City Lines*, 225 Miss. 84, 82 So.2d 648.

In the very words of this court, Mississippi rules prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct unless

he proves that the statement was made with "actual malice" —that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

THE ACTION WAS DETERMINED IN THE STATE COURT AS REQUIRED BY RULES APPROVED IN TIMES V. SULLIVAN.

Petitioner apparently labors under two misconceptions of the opinion of the Supreme Court of Mississippi: (1) that the court inferred malice from the fact that his statements are libelous *per se*, and (2) that that court held that truth was his only defense. The state court did not infer malice from the fact that petitioner's statements were libelous *per se*, although it could have done so without offense to what was said in *Sullivan*. Remember that it is the practice of many jurisdictions, including, according to the annotation in *51 A.L.R. 2d*, which begins at page 552, that of Mississippi and the United States, that privilege and fair comment are regarded as affirmative defenses which must ordinarily be specifically pleaded in order to be available, and there was no such defense interposed in this case. True, at the conclusion of respondent's testimony, a motion for a directed verdict grounded on a claim of absolute privilege was interposed, but no one can doubt that it was properly overruled; nor can there be doubt about the propriety of the trial court's refusal to permit the pleading of an affirmative defense after all of the respondent's evidence was in and his case closed. Hence, the case which the Supreme Court of Mississippi had before it was one wherein petitioner had waived whatever rights were available to him under a plea of qualified privilege, to be decided without reference to the particular rules which come into play only when the plea of privilege is available to a defendant and has been interposed.

But as we have said, the state court did not infer malice from the fact that petitioner's statements were libelous *per se*. It held "that malice was actually established in this case." And it is apparent from the quoted definition of malice which followed that statement that it did so on the basis of proof which showed that the statements were false and that petitioner made the outrageous charges without a scintilla of evidence on which to base them. It showed further that petitioner was prompted to make the statements because respondent had presumed to do his duty on those occasions when petitioner had fallen afoul of the law; as if he was above the law and not subject to prosecution. It discloses an unwillingness to disavow his calumnies, even though he has nothing with which to support them. In short, the proof not only showed that petitioner defamed respondent recklessly without knowing or caring whether his charges were true, but it also showed that he did so out of spite and ill will and with a considered intention to injure respondent.

Truth was not petitioner's only defense to the action. Every defense available to a defendant in a Mississippi libel action who has the right of recourse to a plea of qualified privilege, was available to petitioner in this case. Specifically, he was entitled to the rules which declare that there was no cause of action against him if his statements were made in good faith and without malice, that malice could not be inferred from the publication of the statements, even though they were libelous *per se*, that the court should presume that the statements were made by him in good faith, that respondent had the burden of proving malice, and that respondent had the burden of proving the falsity of the statements. The question of the truth or falsity of the statements would not have entered the case without proof by respondent that petitioner was actuated by bad faith and malice, as to which respondent had the burden of proof.

The fact of the matter is that the case was tried as if petitioner had interposed a plea of qualified privilege. Respondent charged in his declaration that petitioner's statements were published maliciously and in bad faith, and that they were false. Respondent assumed the burden of proving such malice, bad faith and falsity. He met that burden with competent proof, much of it from petitioner himself. There was no substantial evidence in contradiction thereof.

With malice, bad faith and falsity established by proof without substantial contradiction, any defense of qualified privilege was negated. Such would have been the result in any jurisdiction. The same result follows from what was said in *New York Times* v. *Sullivan*.

NEGROES WERE NOT SYSTEMATICALLY EXCLUDED FROM JURY PANEL

There is no dispute about the fact that the systematic exclusion of Negroes from jury panels denies to a Negro defendant the equal protection of the laws guaranteed to him by the Fourteenth Amendment. But no one can seriously contend that a motion based on such proposition is self-proving, and does not require evidence to sustain it.

We have already pointed out that the proof on the motion was exactly contrary to its allegations.

Petitioner cites population figures, but this court knows that no one is qualified to be chosen a juror simply because he lives in the county. He also refers to figures which he claims are registration figures—but which are erroneous, including, as they do, everyone who has registered in Coahoma County since 1949, whether now deceased or now living elsewhere—but this court also knows that no

one is qualified to be chosen as a juror simply because he or she is registered.

Finally, we have petitioner's ipse dixits to the effect that Negroes are disenfranchised in Coahoma County through threats, intimidation, and lack of official cooperation. Of course, he made no effort to substantiate these charges. The reason is clear enough to anyone who knows the facts of the matter. It happens to be a fact that Negroes are not disenfranchised in Coahoma County because of their race.

Since there is no proof in the record on which to base even an argument that Negroes have been systematically excluded from juries in Coahoma County, petitioner's argument to that effect falls of its own weight.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for writ of certiorari should be denied.

Dated January ....., 1965.

SEMMES LUCKETT
Clarksdale, Mississippi
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Clarksdale, Mississippi

CERTIFICATE OF SERVICE

I certify that a copy of the above brief was mailed to each of counsel for petitioner, at his usual address, postage prepaid, on January ....., 1965.

.....

SEMMES LUCKETT

Attorney for Respondent

Office-Supreme Court, U.S.
FILED
JAN 29 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 90

AARON E. HENRY,
Petitioner,

vs.

THOMAS H. PEARSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MISSISSIPPI

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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

AARON E. HENRY,
Petitioner,

vs.

THOMAS H. PEARSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MISSISSIPPI

We respectfully submit that the petition should be denied because—

1) The rights, privileges or immunities under the Constitution of the United States which petitioner seeks to have reviewed were not specially set up or claimed in the state courts; or

2) If the right, privilege or immunity not to be subjected to a libel action except under rules which accord with the holding of this court in *New York Times* v. *Sullivan,* 11 L. Ed. 686, was specially set up or claimed in the state court, petitioner was not denied such right, privilege or immunity because (a) Mississippi's rules of law accord with the holding in *Times* v. *Sullivan,* and (b) this action was determined in the state courts as required by rules approved in *Times* v. *Sullivan.*

STATEMENT OF THE CASE

This is a libel action which was brought by respondent against petitioner in the Circuit Court of Coahoma County, Mississippi, on April 25, 1962. In his declaration respondent, who was County Prosecuting Attorney for Coahoma County, charged that petitioner, on the 6th day of March, 1962, maliciously prepared, composed and published a libelous letter to Mr. Norwood, Deputy Sheriff of Bolivar County, Mississippi, which contained a malicious libel against respondent, and which was thereafter read by the addressee and divers other persons, and that petitioner, also on the 6th day of March, 1962, maliciously prepared, composed and published false, defamatory and libelous statements concerning respondent in his official capacity as County Prosecuting Attorney of Coahoma County by deliberately communicating the same to the United Press International News Bureau, at Jackson, Mississippi, and the Associated Press, at Jackson, Mississippi, with the express intent and for the sole purpose that the same be published, republished, communicated and circulated by such news agencies to their subscribers.

Respondent further charged in his declaration that the false, defamatory and libelous statements communicated to such news agencies were communicated and circulated by such news agencies to their subscribers on March 6 and 7, 1962, and actually published in a number of Mississippi newspapers on March 7, 1962, including the one published in respondent's and petitioner's home town of Clarksdale, Mississippi.

Petitioner, on July 2, 1962, filed his answer to the declaration. In it, he admitted writing the letter to Mr Norwood but denied that it was false, defamatory or libel-

ous, or maliciously prepared. He denied all averments touching the statements to the news agencies.

Petitioner's answer contained no plea of privilege or fair comment.

With the pleadings as thus described, the action came on for trial on July 19, 1962. Respondent thereupon introduced evidence to the following effect:

On the afternoon of March 3, 1962, a warrant was issued by a Justice of the Peace in Shelby, Bolivar County, Mississippi, for the arrest of petitioner on a disorderly conduct charge (R. 61, 62, 64). It was sent to Clarksdale, Coahoma County, Mississippi, where petitioner resides, for execution (R. 62, 64).

Petitioner was arrested later that afternoon by Ben Collins, Clarksdale's Chief of Police, pursuant to the directions of the warrant, and taken to the Clarksdale City Jail (R. 71, 72). The Bolivar County authorities were notified of the arrest and requested to send for the prisoner (R. 72).

In the meantime, W. S. Kincade, Mayor of Clarksdale (R. 90), had learned of the calls from Shelby to Clarksdale about the incident and had left word at the police station for Collins to telephone him when he came in (R. 73, 83, 92). Collins did so (R. 83, 92), and in their conversation told Mr. Kincade of Henry's arrest (R. 83, 84, 92). Mr. Kincade thereupon determined to go to the police station to find out what it was all about (R. 84, 90, 92).

By the time Mr. Kincade arrived at the police station, Eilert, the complaining witness, was there, and so Kincade promptly took Eilert into Collins' office and questioned him (R. 90, 93). As a result of the interrogation Kincade concluded that such offense as had been committed, if any, was not a breach of a city ordinance, but he could come to no

conclusion about whether the offense, if one had been committed, had taken place in Coahoma County or Bolivar County (R. 93). (A look at a map will show that Clarksdale and Shelby are but approximately twenty miles apart and that the dividing line between the two counties is nearly equidistant from both towns.) Accordingly he directed Collins to telephone respondent, the County Prosecuting Attorney of Coahoma County, to come to the police station and inquire into the matter (R. 73, 90, 93, 94).

When respondent arrived at the city jail, present were Mr. Collins, the Chief of Police; Mr. Kincade, the Mayor; and Sterling Eilert (R. 124, 125), and respondent began his investigation by talking with Eilert. After hearing what Eilert had to say, respondent decided that whatever statements he took should be recorded on his tape recorder and accordingly he went to his office and obtained his tape recorder (R. 125). He then took statements from Eilert, Clifford Smith, an employee of petitioner; Noelle Henry, the wife of petitioner; and petitioner himself (R. 125). All were recorded on tape (R. 125).

After talking to those above listed, respondent came to the conclusion that such criminal offense as had been committed, if any had been committed, had not been committed in Coahoma County, and so appellee closed his interview and left the city jail (R. 126). Petitioner was then taken to the Bolivar County jail (R. 64), where he remained until his release was arranged the following morning (R. 39).

On March 6, two days after his release, petitioner wrote the letter to Mr. Norwood in which he stated that he had filed a complaint with the Department of Justice charging that "the charge under which I was arrested was born in the minds of the County Attorney and the Chief of Police"

of Clarksdale, and in which he charged that his arrest was the result of a "diabolical plot" between respondent and Ben Collins (R. 41). The envelope in which it was mailed shows that it was mailed from Clarksdale on March 7, 1962, at 4:00 P.M. (R. 42).

Also on March 6, petitioner had two telephone conversations with Mr. Van H. Savell, of the Associated Press, who had called petitioner to discuss the details of an earlier story about his arrest (R. 99). Petitioner had been out at the time but later returned the call (R. 99). In that conversation petitioner told Savell that he was going to file a complaint with the Department of Justice (R. 100). Around 8:00 o'clock of that evening, petitioner called Savell to tell him he had filed his complaint with the Department of Justice and that he wanted to read it to him (R. 100). He did so twice while Savell was taking notes as to its contents, and then the two had a further discussion (R. 100). Afterwards, Savell devised a message from his notes and wired it to New Orleans where it was rewritten into the story which appeared in the Vicksburg and the Biloxi-Gulfport newspapers. In it, petitioner charged that his arrest "was an attempt to discredit him" and "a diabolical plot cooked up" by respondent and Ben Collins.

Also on March 6, petitioner called the Jackson office of the United Press International (R. 104). He wanted to talk to Mr. Herbers, manager of the office, but Herbers was out (R. 104), and so he talked to Mr. Lloyd B. Jeffers, who works under Herbers (R. 103, 104, 105). In their conversation petitioner told Jeffers that he had filed a complaint with the Department of Justice about his arrest and that he had a statement for release (R. 104), and then read the statement to Jeffers (R. 105). Jeffers took it down as he dictated it (R. 106) and then wrote and sent out the story which was published in the Clarksdale, Greenville, Corinth and

Meridian newspapers (R. 111, 112). It included a statement which petitioner had made over the telephone to Jeffers that his arrest had resulted from "a diabolical plot cooked up" by respondent and Collins (R. 110).

The Clarksdale newspaper in which petitioner's statements appeared (R. 116, 116½) has a circulation of about 6,000 (R. 116), concentrated mainly in Coahoma County and the surrounding counties of Quitman, Tunica and Bolivar (R. 116).

Petitioner knew when he called the Associated Press and United Press International that both were engaged in the business of gathering and disseminating news stories (R. 43). In fact, both organizations had carried stories originating with petitioner prior to March 6, 1962 (R. 43). The charge that his arrest was "a diabolical plot cooked up" by the County Attorney of Coahoma County (Respondent) and the Clarksdale Chief of Police (Ben Collins) was petitioner's own words (R. 101, 102). They were quoted from the statement read by petitioner over the telephone (R. 112).

Respondent is a native of Clarksdale (R. 127), grew up there (R. 127), and attended its public schools (R. 127). He graduated from the University of Mississippi Law School in 1951 (R. 127), served as County Prosecuting Attorney of Coahoma County from 1952 to 1956 (R. 127), was defeated for reelection in 1955 (R. 127), was again elected to the office in 1959 (R. 158). At the time of the trial, he expected to offer for reelection in 1963 (R. 128). He has a private law business in addition to his public duties (R. 128) and much of his clientele is colored (R. 128).

Respondent, at the time of the trial, was 32 years of age, married, the father of four children (R. 128, 129).

Petitioner's charges are false. No one has framed him. No one has "cooked up" any plot, diabolical or otherwise, to have him arrested on a morals charge (R. 74, 124). Nassar, the deputy sheriff of Bolivar County who made the arrest, had never seen Eilert before Eilert approached him in Shelby to complain about what he said had happened in the Star Chief automobile between Clarksdale and Shelby (R. 59). Collins had never seen Eilert until after he had arrested appellant and placed him in jail (R. 75). Respondent had never seen Eilert prior to the time he came to the city hall to question petitioner (R. 125). Collins knew nothing about the events in Shelby until the message came over the radio that a warrant had been issued there for the arrest of petitioner (R. 69, 70). In fact, Collins knew only that petitioner was charged with disorderly conduct when he arrested him (R. 72). The first contact which Collins had with respondent about the matter was when he called respondent to come to the city jail pursuant to the directions of Mr. Kincade (R. 73, 74). The first respondent knew of the affair was gathered from the call to come to the city jail (R. 125). Neither had discussed the matter with the other prior to that time (R. 74, 75, 125).

At the conclusion of respondent's proof, petitioner moved the court for a directed verdict on the grounds, among others:

At the conclusion of respondent's proof, petitioner moved the court for a directed verdict on the grounds, among others:

> That to render a verdict for (respondent) on the testimony and evidence would deny (petitioner) the right of free speech, as guaranteed by the First Amendment of the Constitution of the United States; and
>
> That to render a verdict for (respondent) on the testimony and evidence would deprive (petitioner) of

his rights, under due process of law, under the Fourteenth Amendment of the Constitution of the United States.

The motion was denied.

Petitioner thereupon introduced his evidence. It included his own testimony, on direct examination, that he believed that respondent had harassed him (R. 161) and that, when he wrote the letter to Mr. Norwood and gave the statements to the news agencies, he "felt that some answer to this charge (the charge made against him by Eilert) on my part was necessary. . . . I felt that some answer was necessary." (R. 161). On cross-examination, he reiterated that "I thought it was necessary to give some answer to the charge." (R. 165).

Although petitioner admitted that he hasn't a shred of evidence that respondent had something to do with his arrest, he maintained from the witness chair that respondent had tried to frame him.

Q. Well, I will ask you right now, do you tell this jury, or do you not, that Mr. Pearson—leaving out the word "diabolical"—tried to frame you at any time? (R. 163).

A. I will say in my opinion, he did (R. 163).

Q. Do you say right now that Mr. Pearson tried to frame you? (R. 164).

A. I say I believe he did (R. 164).

After both sides had concluded the presentation of testimony, and after both sides had rested, petitioner moved the court that "he be allowed to amend his (answer) in order to interpose a plea of fair comment." (R. 173). The trial court overruled the motion, observing: "It appearing that both sides had rested when the motion was made, it is overruled."

The jury found for respondent and fixed his damages at $25,000.00 (R. 174).

Petitioner thereafter moved the court for a new trial on the grounds that the verdict of the jury deprived him of his right of free speech as secured by the First Amendment to the Constitution of the United States and that the amount thereof was so grossly excessive as to deprive him of his property contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 178). The motion was overruled (R. 179).

Petitioner prosecuted an appeal to the Supreme Court of Mississippi from the judgment entered in response to the finding of the jury and in his Assignment of Errors charged that the trial court has erred in overruling his motion for a directed verdict made at the close of respondent's case, in overruling his motion to amend his answer so as to allege the defense of qualified privilege by reason of "fair comment," and in overruling his motion for a new trial.

The appeal was set for hearing before the Supreme Court of Mississippi on Monday, October 7, 1963, and was argued before that court on that day.

On December 16, 1963, the judgment of the trial court was affirmed by the Supreme Court of Mississippi. Its opinion appears in 158 So.2d 695.

Petitioner filed a Suggestion of Error with the Supreme Court of Mississippi wherein he suggested that the court had erred in its decision of December 16, 1963, by refusing to reduce the size of the verdict and because "actions under the gulise of libel which encroach upon freedom of speech and impair rights guaranteed by the Fourteenth Amendment of the United States Constitution must be nullified by an appellate court." It was overruled.

THE WRIT SHOULD NOT BE ISSUED FOR ANY OF THE REASONS ADVANCED BECAUSE THE RIGHT, PRIVILEGE OR IMMUNITY DEPENDED UPON FOR SUPPORT WERE NOT SPECIALLY SET UP OR CLAIMED

Jurisdiction to review the judgment of the Supreme Court of Mississippi in this case exists only with respect to a right, privilege or immunity specially set up or claimed by petitioners under the Constitution of the United States. *28 U.S.C., #1257 (3).*

Four reasons have been advanced by petitioner for the issuance of the writ prayed for. Each fails because of the specific provisions of the statute.

Petitioner's first claim is that the judgment is in conflict with the principles enunciated in *New York Times* v. *Sullivan,* 11 L. Ed. 686, wherein this court stated that:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

which means, as we understand the opinion, that in a libel suit brought by a public official because of a statement defaming him with respect to his official conduct, the defense of qualified privilege is available to defendant, and in such a case it is encumbent upon the plaintiff, if defendant interposes the defense of qualified privilege, to prove (a) that the statement was false and (b) that it was published with knowledge of its falsity or with reckless disregard of whether it was false or not.

But petitioner did not claim qualified privilege under the Constitution of the United States. The right, privilege or immunity set up or claimed by him under the Constitution of the United States (done at an improper time and in an improper manner) was that of absolute privilege. His claim was that of absolute immunity from suit by a public official for defamation relating to his official conduct, regardless of the falsity of the defamatory statement and regardless of whether it had been published with "actual malice."

The next reason advanced by petitioner for the issuance of the writ consists of an argument that petitioner's statements were not libelous because petitioner is a Negro engaged in civil rights activities. But the Constitution of the United States does not extend a right, privilege or immunity from libel laws to Negroes engaged in civil rights activities and no such claim was ever specially set up in the state courts.

Petitioner's third reason for the issuance of the writ is essentially a claim of immunity from suit for libel in the state courts of Mississippi. We restrict our response to such claim by pointing to the fact that no such immunity can be found in the Constitution of the United States and that no such claim was ever specially set up in the state courts.

The last reason advanced by petitioner for the issuance of the writ resolves itself into a claim that this is not a private libel action but a state device to suppress criticism of public officials. No such claim was ever specially set up in the state courts and there is not a scintilla of evidence which can be cited in support of such a contention.

MISSISSIPPI'S RULES OF LAW ACCORD WITH HOLDING IN TIMES V. SULLIVAN

The main thrust of petitioner's argument is that the rules which govern actions of libel in Mississippi conflict with the holding of this court in *New York Times* v. *Sullivan*, 11 L. Ed. 2d 686. But petitioner is wrong in his contention. The state's rules are the same as those enunciated by this court in that case.

In Mississippi, criticism of a public or quasi-public official which relate to his public actions, even though they be libelous per se, are qualifiedly or conditionally privileged. *Krebs* v. *McNeal*, 222 Miss. 560, 76 So.2d 693; *Edmonds* v. *Delta Democrat Publishing Co.*, 230 Miss. 583, 93 So.2d 171.

In Mississippi, when the defendant in a libel action is entitled to the defense of qualified privilege, e.g., when a public official sues someone for libel on account of libelous statements made about his official conduct,

> The plaintiff has no cause of action if the statements were made in good faith and without malice;
>
> The truth or falsity of the statements is not involved so long as there is no bad faith or malice;
>
> Malice will not be inferred even though the statements are libelous per se;
>
> It will be presumed that the statements were made in good faith;
>
> Malice and bad faith must be proved by plaintiff;
>
> The falsity of the statements must be proved by plaintiff.

See *Railway Co.* v. *Brooks*, 69 Miss. 158, 13 So. 847; *Louisiana Oil Corporation* v. *Renno*, 173 Miss. 609, 157 So. 705; *Kroger Grocery & Baking Co.* v. *Harpole*, 175 Miss.

227, 166 So. 335; *Scott-Burr Stores Corporation* v. *Edgar*, 181 Miss. 486, 177 So. 766; *Reliance Mfg. Co.* v. *Graham*, 181 Miss. 549, 179 So. 341; *Tipps Tool Co.* v. *Hobfield*, 218 Miss. 670, 67 So.2d 609; *Krebs* v. *McNeal*, 222 Miss. 560, 76 So.2d 693; *Killebrew* v. *Jackson City Lines*, 225 Miss. 84, 82 So.2d 648.

In the very words of this court, Mississippi rules prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

THE ACTION WAS DETERMINED IN THE STATE COURT AS REQUIRED BY RULES APPROVED IN TIMES V. SULLIVAN

Petitioner apparently labors under two misconceptions of the opinion of the Supreme Court of Mississippi: (1) that that court inferred malice from the fact that his statements are libelous per se, and (2) that that court held that truth was his only defense.

The state court did not infer malice from the fact that petitioner's statements were libelous per se, although it could have done so without offense to what was said in *Sullivan*. Remember that it is the practice of many jurisdictions, including, according to the annotation in *51 A.L.R. (2d)*, which begins at page 552, that of Mississippi and the United States, that privilege and fair comment are regarded as affirmative defenses which must ordinarily be specially pleaded in order to be available, and there was no such defense interposed in this case. True, at the conclusion of respondent's testimony, a motion for a directed verdict

grounded on a claim of absolute privilege was interposed, but no one can doubt that it was properly overruled. Nor can there be doubt about the propriety of the trial court's refusal to permit the pleading of an affirmative defense after all of the evidence was in and the case closed. Hence, the case which the Supreme Court of Mississippi had before it was one wherein petitioner had waived whatever rights were available to him under a plea of qualified privilege, to be decided without reference to the particular rules which come into play only when the plea of privilege is available to a defendant and has been interposed.

But as we have said, the state court did not infer malice from the fact that petitioner's statements were libelous per se. It held "that malice was actually established in this case." And it is apparent from the quoted definition of malice which followed that statement that it did so on the basis of proof which showed that the statements were false and that petitioner made the outrageous charges without a scintilla of evidence on which to base them. It showed further that petitioner was prompted to make the statements because respondent had presumed to do his duty on those occasions when petitioner had fallen afoul of the law; as if he was above the law and not subject to prosecution. It discloses an unwillingness to disavow his calumnies, even though he has nothing with which to support them. In short, the proof not only showed that petitioner defamed respondent recklessly without knowing or caring whether his charges were true, simply because he thought it was necessary to give some answer to the charge against him, but it also showed that he did so out of spite and ill will and with a considered intention to injure respondent.

Truth was not petitioner's only defense to the action. Every defense available to a defendant in a Mississippi libel

action who has the right of recourse to a plea of qualified privilege, was available to petitioner in this case. Specifically, he was entitled to the rules which declare that there was no cause of action against him if his statements were made in good faith and without malice, that malice could not be inferred from the publication of the statements, even though they were libelous per se, that the court should presume that the statements were made by him in good faith, that respondent had the burden of proving malice, and that respondent had the burden of proving the falsity of the statements. The question of the truth or falsity of the statements would not have entered the case without proof by respondent that petitioner was actuated by bad faith and malice, as to which respondent had the burden of proof.

The fact of the matter is that the case was tried as if petitioner had interposed a plea of qualified privilege. Respondent charged in his declaration that petitioner's statements were published maliciously and in bad faith, and that they were false. Respondent assumed the burden of proving such malice, bad faith and falsity. He met that burden with competent proof, much of it from petitioner himself. There was no substantial evidence in contradiction thereof.

With malice, bad faith and falsity established by proof without susbstantial contradiction, any defense of qualified privilege was negated. Such would have been the result in any jurisdiction. The same result follows from what was said in *New York Times* v. *Sullivan*.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for writ of certiorari should be denied.

Dated January ....., 1965.

SEMMES LUCKETT
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CERTIFICATE OF SERVICE

I certify that a copy of the above brief was mailed to each of counsel for petitioner, at his usual address, postage prepaid, on January ....., 1965.

.....

/s/ W. O. LUCKETT
Attorney for Respondent.